Law, Religion, and Physician-Assistance to Suicide: The Roles of Christianity in North American Judicial Dignified Death Debates ©

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Résumé

L'aide médicale à mourir est une aide fournie par un médecin afin de permettre à un patient, dont la condition médicale est sans issue et dont les souffrances sont insupportables, de mettre fin à ses jours. Elle peut prendre la forme d'une euthanasie ou d'un suicide médicalement assistée. Elle est autorisée dans plusieurs pays et notamment au Canada et dans plusieurs états américains.

Au Canada et aux États-Unis, les débats judiciaires sur la légalisation ou la décriminalisation du suicide médicalement assisté ont attiré l'attention de nombreux groupes religieux, notamment de foi chrétienne. Ces groupes, en leur qualité d'intervenants et d'*Amici Curiae*, ont tenté d'influencer le débat selon leurs croyances religieuses, si on en croit les mémoires qu'ils ont déposés à la cour. La présente étude vise à analyser les arguments soulevés par ces groupes.

Au Canada, divers arguments de nature religieuse ont été soulevés, mais ceux-ci démontrent une harmonie dans l'interprétation des valeurs religieuses soulevées. C'est ainsi que tant dans l'arrêt *Rodriguez* que dans l'arrêt *Carter*, malgré une évolution de la terminologie utilisée, les groupes religieux ont tenté d'encourager la Cour Suprême à maintenir l'interdiction absolue du suicide médicalement assisté par une morale inspirée par la religion, sans que la portée même de ces valeurs religieuses ne soit remise en question.

Aux États-Unis, au contraire, les débats ont beaucoup porté sur l'histoire de la position du Christianisme face au suicide et à son assistance, deux interprétations diamétralement opposées se faisant face, à travers l'analyse de divers personnages bibliques et martyrs chrétiens. Il apparaît que les positions constitutionnelles sur l'aide médicale à mourir aux États-Unis sont largement tributaires de l'interprétation de l'évolution historique du Christianisme que se font les tenants et opposants de l'aide médicale à mourir.

Mots-clés: suicide médicalement assisté, aide médicale à mourir, droit, religion, Christianisme, Constitution, *Rodriguez*, *Carter*, *Glucksberg*, *Quill*.

Resume

Medical-aid in dying is an assistance provided by a doctor, which enables a patient to end her/his life when her/his medical condition is incurable and when (s)he in excruciating pain. It can take the form of euthanasia or physician-assisted suicide. It is authorized in several countries, which include Canada and several American states.

In Canada and the United States, legal debates on the legalization or decriminalization of physician-assisted suicide have attracted the attention of many religious groups, notably Christian faith groups. These groups, in their capacity as court Interveners and *Amici Curiae* had attempted to influence court debates in accordance to their religious beliefs. This study aims to analyze the arguments that were raised by these organizations and faith-followers in their factums and briefs.

In Canada, the various religious arguments had maintained a harmonious interpretation of pious values. Thus, in the *Rodriguez* and *Carter* cases despite an evolution in the terminology that was employed, religious groups had attempted to encourage the Supreme Court to maintain the absolute prohibition to physician-assisted suicide, without the very nature of these religious values ever being questioned.

In contrast, in the United States, the debates have primarly focused on the history of Christianity's position on suicide and its assistance. Two diametrically opposed interpretations had confronted one another through the analysis of various biblical characters and Christian martyrs. It appears that the constitutional positions on physician-assistance to suicide in the United States were largely dependent upon opponents to medical-aid in dying, who had relied upon a traditional interpretation of the historical evolution of Christianity.

Key words: physician-assisted suicide, medical-assisted death, law, religion, Christianity, Constitution, *Rodriguez, Carter, Glucksberg, Quill.*

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* All electronic sources have last been verified as of December 2017.

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Dr. Gregoire, thank you for your endless patience, empathy and dedication, without you this dissertation would have never come to fruition.

Lastly, I wish to offer gratitude to Madison … thank you for being in my life.

Law, Religion, and Physician-Assistance to Suicide: The Roles of Christianity in North American Judicial Dignified Death Debates

> *I can see how it might be possible for a man to look down upon the earth and be an atheist, but I cannot conceive how a man could look up into the heavens and say there is no God.*
>
> ~ Abraham Lincoln ~

Introduction

For years, North American courts of law have rivaled in constitutional rights-based debates questioning whether physician-assisted suicide procedures should remain criminally prohibited, or should be legalized and confer one the choice to die with dignity.

These court debates have attracted numerous Canadian Interveners and American *Amici Curiae*. The majority have been religious groups, which have been preliminary composed of various Christian denominations.

As such, the doctorate's hypothetical question asks: What were the roles of Christian groups and discourses in the realm of North American judicial physician-assistance to suicide debates?

In order to provide an adequate response, I undertook a law and religion approach, and further found that it was beneficial to separate this dissertation into two parts. The first part presents a comprehensive understanding of existing medical end-of-life laws. The second part proceeds to examine the submissions that Christian religious roles had brought forth to the courts because of the prohibitions to physician-assistance to suicide laws. I have chosen this *demarche* because I perceive "the study of law and religion" as being "the study of two complementary and overlapping elements."[1] These two elements are best described as follows:

> The first of these are the 'external' temporal laws affecting religious individuals and groups. This consists of laws made by the state, international bodies and sub-State institutions. The second of these are the 'internal' spiritual laws or regulations made by religious groups themselves which affect the members of those groups and how those

[1] Russell Sandberg, *Law and Religion* (New York: Cambridge University Press, 2011) at 6.

> groups interact with the secular legal regime.[2]

As such, in this doctoral thesis, I intend to demonstrate that Canadian and American physician-assisted suicide judicial debates have captured the attention of Christian faith-followers and discourses pertaining to Christianity, which have predominately provided two fundamental roles in physician-assistance to suicide disputes. In Canada, this role has consisted in maintaining physician-assisted suicide's ban through religious influences. Whilst in the United States, the role of Christianity was to ensure the accuracy of the history of Christianity's stance of suicide, and its assistance.

[2] *Ibid.*

Part One – Medical-Assisted Death Procedures and Laws

Chapter 1 – An Elucidation of the Law

Chapter one of this dissertation will define what constitutes as, and what does not qualify as physician-assisted suicide. The classification remains imperative for the majority of this essay focuses on physician-assisted suicide court debates.

A. A Concise Lexicon of United States Constitutional Law

To facilitate the reading of medical-assistance to dying and end-of-life procedures in American jurisprudence and publications, I have first enclosed brief definitions that consists of the key constitutional terminology that is oft-found in American physician-assistance to suicide case law.

The following definitions are primarily derived from *Black's Law Dictionary*[3]. I have referred to this publication because Quebec Civil Law, Canadian and American Common Law academics and jurists frequently employ it as a guiding reference.

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[3] *Black's Law Dictionary*, 6th ed [*Black's*].

- The *Fourteenth Amendment of the U.S. Constitution* section 1[4]:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[5]

For the purposes of this dissertation, the *Fourteenth Amendment of the U.S. Constitution* "secures all 'persons' against any state action which results in

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[4] *U.S. Const. amend XIV § 1*; Elisabeth Zoller, *Grands arrêts de la Cour suprême des Étas-Unis* (Paris: Presses Universitaires de France 2000) at 1311; Amendment XIV Citizenship Rights, Equal Protection, Apportionment, Civil War Debt online: National Constitution Center < http://constitutioncenter.org >.

[5] *Ibid*; *U.S. Const. amend XIV § 1*; Zoller, supra note 4 at 1311.

either deprivation of life, liberty or property without due process of law or, in denial of the equal protection of the laws."[6]

- Due Process of Law:

Refers to "fundamental fairness and substantial justice"; thus, constitutional protections against possible "arbitrary" and abusive governmental powers.[7]

- Due Process Clause:

> Two such clauses are found in the U.S. Constitution, one in the 5th Amendment pertaining to the federal government, the other in the 14th Amendment which protects persons from state actions. There are two aspects [to the Due Process Clause]: [1] procedural, in which a person is guaranteed fair procedures and [2] substantive which

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[6] *Black's*, *supra* note 3, *sub verbo* "Fourteenth Amendment".

[7] *Black's*, *supra* note 3, *sub verbo* "Due Process of Law" & "Due process clause"; Infra, note 11; Zoller, supra note 4 at 1321, 1322.

> protects a person's [life, liberty or] property
> from unfair governmental inference or taking.[8]

Thus, the Due Process Clause includes both Procedural Due Process and Substantive Due Process.[9] The former is "[t]he guarantee of procedural fairness […] it must first be shown that a deprivation of a significant life, liberty, or property has occurred. This is necessary to bring the Due Process Clause into play, [for example: "the right] to be heard and, […] notified".[10] Whilst Substantive Due Process "require[s] legislative to be fair and reasonable in content as well as application. Such may be broadly defined as the constitutional guarantee that no person shall be arbitrarily derived of his life, liberty or property. The essence of substantive due process is protection from arbitrary and unreasonable action."[11]

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[8] *Ibid*; *Black's, supra* note 3, *sub verbo* "Due process clause" [words, numbers, & a comma added].

[9] *Black's, supra* note 3, *sub verbo* "Due process clause"; Zoller, supra note 4 at 1321, 1322.

[10] *Black's, supra* note 3, *sub verbo* "Procedural due process" [words, ellipses & a coma added].

[11] *Black's, supra* note 3, *sub verbo* "Substantive due process" [letter added].

- Fundamental Rights:

"Those rights which have their source, and are explicitly or implicitly guaranteed, in the federal Constitution".[12]

- Deep-Roots Test:

> [T]he Court should protect unenumerated
> [constitutional] rights only if the are
> "objectively, deeply rooted in this
> [American] Nation's history and tradition."[13]

The aim of this guideline is to evade the transformation of the "liberty protected by the Due Process Clause" as "policy preferences of the [. . .] Court" by acting as a barrier to eliminate a judge's subjective partialities and "judicial discretion" in the determination of constitutionally protected unenumerated rights.[14]

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[12] *Black's, supra* note 3*, sub verbo* "Fundamental rights".

[13] John C Toro, "The Charade of Tradition-Based Substantive Due Process" (2009) 4 NYU JL & Lib. 172 at 177 (WL) [capitalization & words added].

[14] *Ibid* [ellipsis added].

B. The Different Genres of Medical-Assistance to Dying Procedures

An initial glance at physician-assisted death laws might appear to invoke an unilateral medical procedure through the portrayal of one single definition. Despite this erred assumption, in the medical and legal arenas, assistance to dying fosters various meanings and attaches diverse consequences. In order to avoid legal confusion and the possibility of criminal and disciplinary sanctions brief explanations are merited.

Physician-assisted death or medical-assisted death[15] qualifies as two different practices: physician-assisted suicide and euthanasia.[16] Notwithstanding the uncertainty that may arise due to the terminology, a law-based forewarning stipulates that the primary legal distinction between voluntary active euthanasia and physician assisted-suicide is crucial and is determined by, "which actor is the factual cause of harm".[17] These medical procedures shall be further examined.

[15] Contemporarily may be referred to as: physician-assistance to dying, medical-assistance to dying, death with dignity, dignified death, physician-assisted suicide, physician-assistance to suicide, assisted death, assistance to dying, assisted suicide or assistance to suicide.

[16] Steve Perlmutter, "Physician-assisted Suicide – A Medicolegal Inquiry" (2011) 15 Mich St U J Med & L 203 at 204 (WL).

[17] *Ibid.*

1. Physician-Assisted Suicide

In the first category, physician-assisted suicide[18], which constitutes as an end-of-life medical procedure involves a physician prescribing life-terminating medication to a consenting terminally-ill patient seeking to end her life.[19] The incurable individual self-administers the medication and the physician is not involved in the actual administration of the life-terminating drug.[20] Legally this can be represented as the terminally-ill patient being the "factual cause of harm" in the medical procedure.[21]

2. Euthanasia

The second measure of physician-assistance to dying qualifies as euthanasia[22]. This procedure is achieved when the medical practitioner prescribes and

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[18] Contemporarily may be referred to as: physician-assistance to suicide, dignified death, medical-assisted death, physician-assistance to dying or medical-assistance to dying, physician-assisted suicide, dying with dignity, assisted suicide or assistance to suicide.

[19] See e.g. Jocelyn Downie, *Dying Justice: A Case for Decriminalizing Euthanasia and Physician-Assisted Suicide in Canada* (Toronto: University Toronto Press, 2004) at 6; Perlmutter, supra note 16 at 204; Elizabeth Martin, 9th ed, *Concise Medical Dictionary* (Oxford University Press, 2015) *sub verbo* "assisted suicide" online: (2016) < http://www.oxfordreference.com >.

[20] Perlmutter, supra note 16 at 204.

[21] *Ibid.*

[22] Contemporarily be referred to as medical-assisted death, medical-assistance to dying, dignified death, dying with dignity, assisted death or assistance to dying.

actually dispenses the cessation-of-life medication to the terminally-ill patient[23] by abiding to the above-mentioned notion of responsibility or liability the physician's conduct is the "factual cause of harm" since she performs the last act of administrating the medication.[24]

There remains to introduce the various forms of euthanasia that consist of: involuntary euthanasia, non-voluntary euthanasia, active voluntary euthanasia, and passive voluntary euthanasia.

Involuntary euthanasia occurs when medical-assistance to dying occurs against the wishes and desires of the individual concerned.[25] In most countries, involuntary euthanasia is regarded as being immoral, perceived as murder and is often associated with the historical and infamous Holocaust and former Eugenics practices.[26]

The second form of euthanasia is non-voluntary euthanasia, which transpires when the desires of the person - in regards to seeking an assistance to life

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[23] See e.g. Perlmutter, supra note 16 at 204; Martin, supra note 19 *sub verbo* "euthanasia".

[24] Perlmutter, supra note 16 at 204.

[25] See e.g. Downie, supra note 19 at 7; Martin, supra note 19, *sub verbo* "euthanasia".

[26] Richard Posner, "Physician-Assisted Suicide", online: The Becker-Posner Blog < http://www.becker-posner-blog.com >.

termination procedure - are undisclosed, unsure, or unclear.[27] Uncertainty may exist "either because the patient [requesting euthanasia] has always been incompetent, is now incompetent, or has left no advance directive."[28] For some, this method of euthanasia can be referred to as a "mercy killing", but not for the Supreme Court of Canada.[29]

The third form of euthanasia consists of active voluntary euthanasia; the procedure involves a terminally-ill patient, who consents to a life ending procedure while the physician is the final performer of the act.[30] For instance, some individuals have considered the late Pathologist Dr. Kevorkian, and the

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[27] See e.g. Downie, supra note 19 at 7;"Euthanasia", online: Encyclopedia of Death and Dying <http://www.deathreference.com/En-Gh/Euthanasia.html>.

[28] *Ibid.*

[29] *Ibid*; For certain individuals the Canadian *R. v. Latimer* case has remained an alleged exemplar of this type of death. This case had involved a farmer named Robert Latimer the father of Tracy Latimer, a non-mobile "quadriplegic" girl, who had suffered from acute "cerebral palsy". Tracy's medical condition had left her in a continually excruciating state of distress, which caused her to continuously scream out in pain. Due to another medical symptom, she allegedly was unable to tolerate pain control medication. After learning that Tracy had required more surgery – to which, her parents did not consent - and in order to permanently cease his daughter's suffering, Mr. Latimer had terminated his daughter's life by subjecting Tracy to an euthanasia-based death through the inducement of "carbon monoxide" from his truck. Even though, the Supreme Court upheld that Latimer was guilty of second-degree murder, it remains noteworthy to mention that the court did mention that:

> The law has a long history of difficult cases. We recognize the questions that arise in Mr. Latimer's case are the sort that have divided Canadians and sparked a national discourse. This judgment will not end that discourse.

See *R. v. Latimer* 2001 SCC 1, [2001] 1 SCR 3 at paras 1, 4, 6 - 8, 10 - 13, 15.

[30] See e.g. Downie, supra note 19 at 7; Martin, supra note 19, *sub verbo* "euthanasia".

use of his "death machines" to performed euthanasia on consensual patients - in order to eliminate all forms of human suffering - as a pertinent model of active voluntary euthanasia.[31] While, others have defined this practice as murder – more precisely as second-degree murder - as was held by the court of law of the State of Michigan.[32]

The last form of euthanasia is known as voluntary passive euthanasia. Fundamentally, there are minimally three vital criteria to be met in order to qualify as passive euthanasia:[33] "(1) there is a withdrawing or withholding of life-prolonging treatment (2) the main purpose (or one of the main purposes) of this withdrawing or withholding is to bring about (or 'hasten') the patient's death (3) the reason for 'hastening' death is that dying (or dying sooner rather than later) is in the patient's own best interests."[34] Therefore, the mere refusal,

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[31] The State of Michigan's Dr. Jack Kevorkian had publicly demonstrated consenting voluntary active euthanasia by administering a legal injection to a patient, Thomas Youk. Following that particular television episode Doctor Kevorkian was convicted of second-degree murder.

See *People v Kevorkian* 248 Mich App 373 (2001) (WL) ("[a]lthough defendant's appellate counsel has carefully avoided using the words […] the records indicate that defendant was quit specific when describing his actions; he said that he was engaged in 'active euthanasia' and the consent form that Youk signed directly refers to such active euthanasia." at *388) [*Kevorkian* – Youk]; See e.g. Penny Lewis, "Rights Discourse and Assisted Suicide" (2001) 27 Am J L & Med 45 at 45 fn 2 (WL).

[32] *Ibid*; *Kevorkian* – Youk, *supra* note 31.

[33] E. Garrard & S. Wilkinson, "Passive Euthanasia", online: (2005) 31:2 Journal of Medical Ethics 64-68 at 65 < http://www.jme.bmj.com >.

[34] *Ibid.*

withdrawal or withholding of medical treatment, alone, does not constitute as voluntary passive euthanasia.[35]

C. The Exclusions to Physician-Assisted Suicide

Studies have evidenced that there are two vital medical procedures that do not qualify as physician-assisted suicide: the right to refuse "life-maintaining treatment", and "palliative care" and its possibility of "hastening death".[36] Despite not being classified as such, it remains that these procedures have oft-been compared to physician-assistance to suicide, especially in courts of law by proponents of dignified deaths.[37] While, opponents to the procedure have maintained distinctions amongst the medical procedures, which were usually argued on the notion of the attending physician's intention.[38]

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[35] *Ibid* (one should take notice that voluntary passive euthanasia may not necessarily be interchanged with the "withdrawing or withholding from life-prolonging treatment" at 65).

[36] See e.g. *Rodriguez v British Columbia (AG)*, [1993] 3 SCR 519, 1993 CarswellBC 228 at para 25 (WL) [*Rodriguez*].

[37] See e.g. *Rodriguez, supra* note 36 ("[t]he distinction between withdrawing treatment upon a patient's request […] and assisted suicide […] has been criticized as resting on a legal fiction" at para 54) [ellipses added & capitalization omitted].

[38] See e.g. .g. *Rodriguez, supra* note 36 ("[t]he fact that doctors may deliver palliative care to terminally ill patients without fear of sanction, it is argued, attenuates to an even greater degree any legitimate distinction which can be drawn between assisted suicide and what are currently acceptable forms of medical treatment. The administration of drugs designed for pain control in dosages which the physician knows will hasten death constitutes active contribution to death by any standard. However, the distinction drawn here is one based upon intention — in the case of palliative care the intention is to ease pain, which has the effect of hastening death, while in the case of assisted suicide, the intention is undeniably to cause death" at para 57).

1. The Right to Refuse or Withdraw Life-Sustaining Medical Treatment

North American courts of law have recognized the right to refuse or withdraw from medical treatment either through the Common Law and/or as a constitutional protection; this confers that a patient can legitimately refuse or withdraw medical interventions, without government intrusion, even if the procedure qualifies as a necessity.[39]

Thus, this lawful procedure permits a mentally competent adult to voluntarily consent[40] to the withholding or refusal of life-preserving medical treatment;

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[39] See e.g. Downie supra note 19 (in Canada due to "case law, common law, and provincial legislation" one can "look beyond the text of the *Criminal Code* at 17).

[40] A relevant Supreme Court case is the *Ciarlariello v. Schacter* case where the court had ruled that a patient who had previously given her consent to undertake a medical procedure may withdraw this consent at anytime, even during a medical procedure, except if the discontinuation "would seriously endanger the patient". Thus, if a physician choses to continue the procedure when advised to stop by the patient the doctor could face legal consequences, such as battery. Furthermore, if the patient, who originally gave her consent then withdrew it, but then gave her consent once again, the doctor must again be subject to disclosure and obtain the patient's informed consent, if "the patient would want to have the particular information in order to make his or her decision as to whether to continue."

In the case at hand, Mrs. Ciarlariello was identified as having an "aneurism". The patient underwent two "cerebral angiograms" because the first was unsuccessful. During the second procedure, Mrs. Ciarlariello, asked the physician to stopped the procedure. The physician told the patient that only five more minutes were needed in order to terminate the procedure. Mrs. Ciarlariello then requested the physician to continue. Following her instructions to proceed the doctor "inserted an injection of dye which rendered her a quadriplegic." Mrs. Ciarlariello died prior to the court case.

Although her estate continued the proceedings, the Supreme Court found that the withdrawal of Mrs. Ciarlariello's consent had been evident and presented no legal problem. Also, there was no need for the physician to further disclose the risks because no material changes had occurred. As such the "action for battery" and for "negligence" were unsuccessful, and the "appeal was dismissed".

notwithstanding that death may be the outcome.[41] The procedure equally applies to an individual's right to refuse nutrition and hydration, and suggests that a person may deny these practices and not be subject to forcible feeding, even if the rejection results in the individual dying.[42]

a. The Country of Canada and the Province of Quebec

i. The *Malette v. Shulman* and the *Nancy B. v. Hotel- Dieu de Quebec* Decisions

Two relevant cases that have acknowledged the right-to-refuse life-sustaining medical treatment shall be reviewed.

In the *Ciarlariello* case the Court had referenced Justice Robins' words from the *Fleming v. Reid* debate, which remain paramount:

> The right to determine what shall, or shall not, be done with one's own body, and to be free from non-consensual medical treatment, is a right deeply rooted in our common law. This right underlies the doctrine of informed consent […]. The fact that serious risks or consequences may result from a refusal of medical treatment does not vitiate the right of medical self-determination […]. It is the patient, not the doctor, who ultimately must decide if treatment -- any treatment -- is to be administered.

Ciarlariello v. Schacter [1993] 2 SCR, 1993 CarswellOnt 803 (WL) at paras 3, 4, 13, 17-19, 41 [*Ciarlariello*] [ellipeses added].

[41] See e.g. *Ciarlariello, supra* note 40.

[42] See *Manoir de la Pointe Blue c Corbeil* [1992] RJQ 712, 1992 CarswellQue 1623 (the court had ruled that the refusal to undertake nutrition in order to end one's life was legal); See also *British Columbia Attorney General v Astaforoff* (1983) Carswell BC 445, [1984] 4 WWR 385 para 16; Downie, *supra* note 39 at 18.

Firstly, in the *Malette v. Shulman*[43] Canadian case, the Ontario Court of Appeal was of the opinion that the right to decline medical treatment along with its highly probable deadly consequences was legally recognized.[44]

This decision involved a car accident victim, Ms. Malette - a Jehovah's Witness - who due to her injuries was transported to the hospital's emergency ward.[45] Although unconscious and in need of crucial blood transfusion the accident victim's purse included a card indicating that she did not consent to blood transfusion due to religious reasons.[46] Despite the fact that her treating doctor Dr. Shulman, and an attending nurse had taken notice of the card the physician proceeded with the blood transfusion.[47] It is paramount to note that prior to the transfusion taking notice of the card indicating that the patient was a Jehovah's Witness, who did not consent to undergo blood transfusion in any event was a significant expression of her consent to refuse medical treatment.[48]

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[43] 72 OR (2d) 417, 1990 CarswellOnt 642 (WL) [*Malette*].

[44] *Ibid.*

[45] *Ibid* at paras 1, 4.

[46] *Ibid* at para 4.

[47] *Ibid* at paras 4, 6.

[48] *Ibid* at para 13.

Notwithstanding the fact that the doctor saved her life, the Jehovah's Witness patient sued for the "administration of the blood transfusions, in the circumstances in her case constituted negligence and assault and battery and subjected her to religious discrimination".[49]

The Ontario Court of Appeal sided with Mrs. Malette, and ruled that the Common Law does recognize the right to refuse medical treatment, and that Dr. Shulman committed battery by not respecting that refusal.[50] Paradoxically, if Dr. Shulman would have not administered the blood transfusion - thus respecting the patient's refusal to treatment – and death would have been the outcome, Dr. Shulman would have not been subject to legal culpability.[51]

Subsequently, after the *Malette*[52] case was rendered the Superior Court of Quebec ruled in the *Nancy B v. Hôtel-Dieu de Quebec*[53] case that the removal of a life-preserving medical apparatus at the request of a consenting patient was

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[49] *Ibid* at para 9.

[50] *Ibid* at para 14.

[51] *Ibid* at 47.

[52] *Malette, supra* note 43.

[53] [1992] RJQ 361, 1992 CarswellOue 2122 (WL) [*Nancy B.*].

legal.[54] Due to a "liberal" and "board interpretation" of the pertinent dispositions of the *Criminal Code of Canada*[55] and the *Civil Code of Lower Canada*[56] the court's ruling held that even though the *Criminal Code of Canada* provided a textual prohibition to the refusal of medical treatment that it would be unreasonable to entirely disallow such a refusal, especially when the patient is acting upon an informed consent.[57]

It is essential to recall that in the *Nancy B.* case, which involved a paralyzed woman diagnosed with *Guillain-Barre's* disease, that she had applied to the Superior Court of Quebec to seek an injunction for the removal of her artificial life-sustaining "respirator".[58] Nancy B. was not only successful in winning her court case, but in further aiding in Canada's recognition of the "right to refuse life-sustaining treatment".[59]

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[54] *Ibid*.

[55] RSC 1985, c C-46 [*Criminal Code*].

[56] 29 Vict., ch. 41, (1865); *Civil Code of Quebec*, SQ 1991, c 64 (the *Civil Code of Lower Canada was* replaced by the *Civil Code of Quebec* as of January 1st, 1994).

[57] *Ibid; Criminal Code, supra* note 55; *Nancy B*, *supra* note 53 at 65; Downie, supra note 19 at 18.

[58] *Ibid* at 17; *Nancy B*, *supra* note 53 at paras 1, 8, 9.

[59] *Nancy B*, *supra* note 53; Downie, supra note 19 at 4.

The facts of the decision initially showed that upon Nancy's admission to the hospital there was a possibility that her health would improve through the use of an artificial respirator, but the medical attempt was unsuccessful as her condition was later diagnosed as being "irremediable" and permanent.[60] After the discovery that her health would not improve Nancy B. decided that she did not wish for her life to continue on being reliant on the respirator, thus, she undertook "two hunger strikes" to evidence her determination.[61]

In proceeding to render justice for Nancy, Judge Dufour's "introductory remarks" remain notable:[62]

> *What Nancy. B. is seeking, relying on the principle of personal autonomy and her right to self-determination, is that the respiratory support treatment being given her cease so that nature may take its course; that she be freed from slavery to be a machine as her life depends on it.* ***In order to do this, as she is unable to do it herself, she needs the help of***

[60] *Nancy B*, *supra* note 53 at para 11; Bernard M. Dickens, "Medically Assisted Death: Nancy B. v Hotel-Dieu de Quebec" Case Comment (1993) 38 McGill LJ 1053 at 1055.

[61] *Ibid*; *Nancy B*, *supra* note 53 at para 11.

[62] *Ibid* at para 50.

> ***a third person**. Then, it is the disease which will take its natural course.* [63]

A study of a McGill Law Journal case commentary about the *Nancy B.* case has revealed that the author had suggested that the decision:

> **[N]arrows the gap between letting a patient suffer natural death and assisting suicide.** It fits within a category of lawful, medically assisted natural death, in that it authorizes a physician to prepare a patient for death that continuation of medical treatment could postpone for years and perhaps decades. Nancy B. could not have survived without artificial respiration […]. Once it was withdrawn, however, she would die [...]. To avoid sensational publicity, neither Nancy B. nor her hospital or physician discussed circumstances of her death or management of those circumstances. In his judgment, Dufour J. simply permitted the named attending physician to stop respiratory support treatment

[63] *Ibid* [emphasis added].

> and to request the hospital to provide "the necessary assistance in circumstances such as these". The informed speculation is that the physician would induce deep sleep or coma in the patient and then remove the ventilation tube that achieved respiration, so that the patient would die naturally […]. The humanity of permitting peaceful death is obvious.[64]

Albeit, Justice Dufour did reason that suicide was not correlated with the right to refuse medical treatment it is paramount to take notice that Nancy had unsuccessfully attempted suicide through prior "hunger strikes".[65] Whilst, it was observed that the *Nancy B.* case "was found to be neither suicide nor homicide, the case does not contribute directly to the increasingly sympathetic literature and understanding on physician-assisted suicide […]."[66]

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[64] Dickens, supra note 60 at 1061 [ellipses, emphasis & capitalization added].

[65] *Ibid* at 1055; *Nancy B, supra* note 43 at para 11.

[66] Dickens, supra note 60 at 1060.

It remains that Justice Dufour had acknowledged that third-party help was required to grant her termination-of-life request.[67] As such, he authorized Nancy's treating doctor to discontinue the use of her artificial respirator;[68] noting that during the withdrawal of her apparatus that her doctor would ensure her "dignity" was upheld.[69]

ii. The *Malette* and *Nancy B.* Precedents in the *Rodriguez* and *Carter* Supreme Court Physician-Assisted Suicide Cases

An examination of Canadian case law has demonstrated that it appears that for many supporters of physician-assistant death the mere fact that a physician removes a life-sustaining apparatus, such as Nancy B.'s respirator, constitutes as physician-assistance to dying. Thus, whether a physician prescribes a medical prescription for lethal medication or inserts such, or removes a life-preserving apparatus to terminate a consenting patient's life, an advocator to a dignified death will see no differences.

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[67] *Nancy* B, *supra* note 53 at 50.

[68] *Ibid* at paras 45, 72.

[69] *Ibid* at para 73.

This ideology was presented in the first Canadian physician-assisted suicide Supreme Court case *Rodriguez v. British Columbia (Attorney* General*)*.[70] Despite the majority's denial to grant Ms. Rodriguez's plea for assistance to suicide, it remains that the reasoning from two dissenting judges – the late and former Supreme Court Chief Justice Lamer and former Supreme Court Justice Cory – are worthy of observation; they had recognized that the right to refuse or withdraw from life-sustaining medical intervention held an undeniable similarity to the physician-assisted suicide procedure.[71]

Firstly, Justice Lamer had referenced the Canadian *Malette*[72] decision and Quebec's *Nancy B*[73] case.[74] He referred to these precedents not only to demonstrate the legality of these procedures, but also to reveal that the prohibition to physician-assisted suicide "must be considered in the larger framework, which regulates the control individuals may exercise over the timing and circumstances of their death."[75] Through the "rationale" of these

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[70] *Rodriguez, supra* note 36 at paras 25, 54.

[71] *Ibid* at paras 195, 259.

[72] *Ibid; Malette, supra* note 43.

[73] *Nancy B, supra* note 53; *Rodriguez, supra* note 36 at para 195.

[74] *Ibid; Malette, supra* note 43; *Nancy B, supra* note 53.

[75] *Ibid; Rodriguez, supra* note 36 at para 195; *Malette, supra* note 43.

said cases the Justice had advocated the importance of respecting a person's "autonomy" even when the person is no longer self-reliant; thus, a matter of honoring a person's "self-worth and dignity".[76]

The second dissenting justice Judge Cory had further addressed the ongoing conundrum, by stating that:

> I can see no difference between permitting a patient of sound mind to choose death with dignity by refusing treatment and permitting a patient of sound mind who is terminally ill to choose death with dignity by terminating life preserving treatment, even if, because of incapacity that step has to be psychically taken by another on her instructions. Nor is there any reason for failing to extend that same permission so that a terminally ill patient facing death may put an end to her life through the intermediary of another […].[77]

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[76] *Ibid; Rodriguez, supra* note 36 at para 195; *Nancy B, supra* note 53.

[77] *Rodriguez, supra* note 36 at para 259.

It remains that the majority of the justices in the *Rodriguez*[78] case, were not in accordance with the dissenting judges' dialogues regarding the similarities between the right to the refusal and withdrawal of life-sustaining medical intervention and physician-assisted suicide.[79]

Former Supreme Court of Canada Justice John Sopinka, who led the *Rodriguez* majority had referred to the *Malette*[80] and *Nancy B.*[81] cases - and had further cited the *Ciarlariello v. Schacter*[82] case.[83] The Justice also had referenced the *Cruzan v. Director, Missouri Health Department*[84] case - the American Supreme Court case - which had highlighted the right to refuse life-sustaining medical treatment and the procedure's constitutional protection in light of the liberty interest of the *Fourteenth Amendment of the U.S. Constitution*.[85]

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[78] *Rodriguez, supra* note 36.

[79] *Ibid.*

[80] *Malette, supra* note 43; *Rodriguez, supra* note 36 at para 41.

[81] *Ibid; Nancy B, supra* note 53.

[82] *Ciarlariello, supra* note 40.

[83] *Ibid; Rodriguez, supra* note 36 at para 41; *Nancy B, supra* note 53; *Malette, supra* note 43.

[84] 110 S Ct 2841 (1990) (WL) [*Cruzan*].

[85] *Ibid; U.S. Const. amend XIV; Rodriguez, supra* note 36 at para 41.

The Justice had concurred with the aforementioned precedents and the Common Law right to refuse and withdraw potentially life-saving treatment even if death was the final outcome.[86] Asserting that the right of refusal or withholding of vital medical treatment is acknowledged and finds application in Canadian law.[87] Nonetheless, physician-assisted suicide was not to be offered the same recognition as an accelerated death that resulted from palliative care, despite the fact that both procedures provided for a "hasten death" objective.[88]

The following excerpt provides evidence of the Justice's reasoning in regards to upholding vital distinctions amongst various end-of-life medical procedures:

> Whether or not one agrees that the active vs. passive distinction is maintainable, however the fact remains that under our common law, the physician has no choice but to accept the patient's instructions to discontinue treatment. To continue to treat the patient when the patient has withdrawn consent to

[86] *Ibid* at para 41.

[87] *Ibid.*

[88] *Ibid* at para 57.

> that treatment constitutes battery […] . The doctor is therefore not required to make a choice which will result in the patient's death as he would be if he chose to assist a suicide or to perform active euthanasia.[89]

Contrarily to the Supreme Court *Rodriguez*[90] majority, a study of Canada's second physician-assisted suicide trial decision *Carter v. Canada (Attorney General)*[91] has shown that Justice Smith had heard expert opinions and evidence from leading medical professionals and ethicists, who had established that the right-to-refuse medical interventions and physician-assisted suicide generated almost identical results.[92] Amongst several other factual and legal considerations, Justice Smith welcomed these medical and ethical conclusions, which provided help in her ruling that Canadian prohibition to physician-assisted suicide was unconstitutional.[93]

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[89] *Ibid* at para 56.

[90] *Rodriguez, supra* note 36.

[91] 2012 BCSC 866, 287 CCC (3d) 1 (WL) [*Carter* BCSC].

[92] *Ibid* at 5

[93] *Ibid* at para 335.

An examination of the Justice's exploration of the opinions of ethicists regarding physician-assisted suicide has shown that several convictions demonstrated the transparency between the right to refuse medical treatment and physician-assistance to suicide.[94] Amongst those professional opinions, she had referred to Professor Sumner, whose conclusion helped to dissolve the perception that there existed vital distinctions amongst various end-of-life procedures.[95] This highly significant viewpoint was summed up as follows:

> Professor Sumner refers to searches for an ethical bright line distinguishing among end-of-life measures. He describes arguments that attempt to distinguish: acts from omissions; a patient's request for treatment will hasten death from refusal of a treatment which will prolong life; killing from letting die; and death as an intended outcome. He concludes that there is simply no way to show that, of the four treatment options (treatment cessation, pain management, terminal sedation and assisted death),

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[94] See e.g. *Carter* BCSC*, supra* note 91 at para 234.

[95] *Ibid at* paras 234 – 237.

> assisted death is uniquely ethically impermissible. He says that if it is impermissible then so are some of the others If they are all permissible, then so is assisted death.[96]

It appears that this passage aided in the elimination of the unjustified partitioning of end-of-life procedures, for Justice Smith had asserted that the opinions of the ethicists had provided influences that convinced her that there existed "no ethical distinction between physician-assisted death and other end-of-life practices whose outcome is highly likely to be death".[97]

b. The United States

i. The Supreme Court *Cruzan* Case

A study of cases from the Supreme Court of the United States has shown that the highest court of the land had also addressed the constitutionality of the

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[96] *Ibid* at para 235.

[97] *Ibid* (Justice Smith had also cited the *Malette* and *Nancy B.* cases – amongst other cases – which, contributed as strong legal influences in her justification of the unconstitutionality of 241(*b*) of the *Criminal Code of Canada*, and the Justice had also indicated that in the realm of medical end-of-life decisions, which by analogy equally included physician-assisted suicide, the core of an individual's choice lied within the Doctrine of Informed Consent at para 335).

refusal of potentially life-saving medical treatment in the leading *Cruzan v. Director, Missouri Department of Health*[98] decision.

In *Cruzan*[99] a woman, who had suffered a vehicle accident that had left her in a coma had never previously declared in appropriate documentation her wishes to be removed from artificial life support if deprived from all quality of life and unable to provide consent.[100] This omission had led her parents to seek such a request in front of the court.[101]

The case ruled on the primary issue, which involved the refusal of life-supporting treatment when requested by a guardian in the absence of legal written evidence authorizing the patient's refusal of medical intervention.[102] The Supreme Court concluded that the United States Constitution was not opposed with the State of Missouri's requirement for "clear and convincing"

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[98] *Cruzan, supra* note 84.

[99] *Ibid.*

[100] *Ibid* at *2842 Syllabus.

[101] *Ibid.*

[102] *Ibid.*

evidence in absence of written documentation, and granted judgment in favor for the State of Missouri.[103]

The opinion of the majority of the Justices in the *Cruzan*[104] case remained highly relevant for it equally determined the existence of a constitutional protection for the refusal of life-saving care.[105] The Supreme Court agreed that the refusal or withdrawal of vital "medical treatment" while death might very well be the outcome is a "constitutionally protected liberty interest" via the Due Process Clause of the *Fourteenth Amendment*.[106] As discussed in the Canadian cases, this American decision was based on the historical notion of "battery", and "the common-law doctrine of informed consent, which are viewed as generally encompassing the right of a competent individual to refuse medical treatment".[107]

Further research has evidenced that the *Cruzan* case had provided a crucial comparison with suicide, especially in regards to the "obiter dictum" of the late

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[103] *Ibid.*

[104] *Cruzan, supra* note 84.

[105] *Ibid at* **2851.

[106] *Ibid*; Zoller, supra note 4 at 1264.

[107] *Ibid*; *Cruzan, supra note* 84 at **2846.

and former Supreme Court Judge Scalia.[108] Although Scalia was supportive of the *Cruzan* majority decision in regards to the requirement of "clear and convincing" evidence in the absence of formal legal instruments requesting the refusal or withdrawal of medical intervention, it is paramount to take notice that the Justice had found no constitutional right to refuse life-sustaining medical treatment.[109] He had asserted that the *Fourteenth Amendment* Substantive Due Process did not protect the right-to refuse life-preserving medical treatment.[110] Stating that "suicide---including suicide by refusing to take appropriate measures necessary to preserve one's life; that the point at which life becomes 'worthless,' […] are [not] set forth in the Constitution nor known to the nine Judges of this Court […] ".[111] The Justice appeared to claim that by arguing the contrary it would merely result in the creation of such a right.[112]

Most interestingly, Justice Scalia had professed that between the "passive acceptance" of the refusal of medical treatment, and the "affirmative act" of

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[108] *Cruzan, supra* note 84.

[109] *Ibid* at **2859 - **2863.

[110] *Ibid* at **2863.

[111] *Ibid* at **2859 [ellipses added].

[112] *Ibid* at **2863.

suicide that there existed an "irrelevance between the action-inaction distinction. Starving oneself to death is no different from putting a gun to one's temple as far as the common-law definition is concerned […]."[113]

ii. The *Cruzan* Precedent in the United States Supreme Court Physician Assisted Suicide Cases

It remains that despite the *Cruzan* majority ruling, the U.S. Supreme Court in succeeding physician-assisted suicide debates had found no similarities between the right to refuse and withdraw from life-preserving treatments and physician-assisted suicide.[114] The *Cruzan*[115] case was documented in the United States Supreme Court *Washington v. Glucksberg*[116] and *Vacco v Quill*[117] physician assisted suicide cases. The findings of both cases shall be presented.

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[113] *Ibid* at **2861.

[114] *Cruzan, supra* note 84; *Washington v Glucksberg* 521 US 702 (1997), 117 S Ct 2258 (1997) (WL) [*Glucksberg*]; *Vacco v Quill* 521 US 793 (1997), 117 S Ct 2293 (1997) (WL) [*Quill*].

[115] *Cruzan, supra* note 84.

[116] *Glucksberg, supra* note 114.

[117] *Quill, supra* note 114.

Firstly, in the *Glucksberg*[118] case the Supreme Court had remained determined not to expand the *Cruzan* case as being an all-inclusive constitutionally protected 'right to die', which would have recognized the legality of physician-assisted suicide.[119] This claim was revealed through the following brief statement:

> [A]lthough Cruzan is often described as a 'right to die' case, [...] we were, in fact, more precise: We assumed that the Constitution granted competent persons a "constitutionally protected right to refuse lifesaving hydration and nutrition."[120]

Secondly, in the *Vacco v Quill*[121] case the *respondents* primarily took issue with the fact that the right to refuse life-sustaining treatment was a legal medical end-of-life practice in the State of New York, and that physician-assisted suicide was not legal, but that both procedures were nonetheless

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[118] *Glucksberg, supra* note 114.

[119] *Ibid* at **2268.

[120] *Ibid* [capitalization & ellipsis added].

[121] *Quill, supra* note 114.

identical, thus, "essentially the same thing".[122] As a result, it was argued that the New York statute prohibiting physician-assisted suicide violated the Equal Protection Clause of the *Fourteenth Amendment*.[123]

The history of the *Quill* case has revealed that the *Quill*[124] District Court case had previously reasoned that between the passive act of the right-to-refuse medical intervention and the active act of physician-assisted suicide that a distinction did indeed exist, and concluded that there was no constitutional right to physician-assisted suicide.[125]

Whilst, the *Quill*[126] Court of Appeals had disagreed with the District Court by reasoning that:

> New York law does not treat similarly circumstanced persons alike: those in the final stages of terminal illness who are on life-support systems are allowed to hasten their

[122] *Ibid* at **2295 Syllabus, **2296.

[123] *Ibid* **2295 Syllabus.

[124] *Quill v Koppell* 870 F Supp 78 (1994) [*Quill* District Court].

[125] *Ibid.*

[126] *Quill v Vacco* 80 F 3d 716 (1996) [*Quill* Court of Appeals].

> deaths by directing the removal of such systems; but those who are similarly situated, except for the previous attachment of life-sustaining equipment, are not allowed to hasten death by self-administering prescribed drugs. The district judge has identified "a difference between allowing nature to take its course, even in the most severe situations, and intentionally using an artificial death-producing machine." […] But Justice Scalia, for one, has remarked upon "the irrelevance of the action-inaction distinction, noting that "the cause of death in both cases is the suicide's conscious decision to 'pu[t] on end to his own existence.' "[127]

The New York's assisted suicide ban was stricken by the Court of Appeals.[128]

In the Supreme Court *Quill* case, the late and former Justice William Rehnquist had sided with the District Court that no constitutional right to physician-

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[127] *Ibid* at *729.

[128] *Quill* Court of Appeals, *supra* note 126.

assisted suicide existed.[129] It appears that the Justice had relied on notions of "causation and intent" to demonstrate that a difference was indeed found between the right to refuse and withdraw from life-preserving intervention and physician-assisted suicide:[130]

> Unlike the Court of Appeals, we think the distinction between assisting suicide and withdrawing life sustaining treatment, a distinction widely recognized and endorsed in the medical profession and in our traditions, is both important and logical; it is certainly rational. […] The distinction comports with fundamental legal principles of causation and intent. First, when a patient refuses life sustaining medical treatment, he dies from an underlying fatal disease or pathology; but if a patient ingests lethal medication prescribed by a physician, he is killed by that medication. […] Furthermore, a physician who withdraws, or honors a

[129] *Quill*, *supra* note 114

[130] *Ibid* at **2298, **2299.

> patient's refusal to begin, life sustaining medical treatment purposefully intends, or may so intend, only to respect his patient's wishes and "to cease doing useless and futile or degrading things to the patient when [the patient] no longer stands to benefit from them." […] A doctor who assists a suicide, however, "must, necessarily and indubitably, intend primarily that a patient be made dead." […] Similarly, a patient who commits suicide with a doctor's aid necessarily has the specific intent to end his or her own life, while a patient who refuses or discontinues treatment might not. […] The law has long used actors' intent or purpose to distinguish between two acts that that may have the same results.[131]

The Supreme Court had also cited the *Cruzan*[132] case noting that it had "implicitly" made the differentiation amidst leaving an individual to die and

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[131] *Ibid* [ellipses added].

[132] *Cruzan, supra* note 84.

causing an individual to die.[133] Adding that their "assumption of a right to refuse treatment was grounded not, as the Court of Appeals supposed, on the proposition that patients have a general and abstract 'right to hasten death,' […]. *Cruzan* therefore provides no support for the notion that refusing life sustaining medical treatment is 'nothing more nor less than suicide'."[134]

2. Palliative Care and Hastened Death

The second end-of-life medical procedure that does not legally or medically qualify as physician-assisted suicide is palliative care.[135] Under this procedure terminally ill patients who are suffering incessantly may have the option – although not as an absolute choice or alternative[136] - of being admitted into palliative care in order to control and diminish their pain through the sedation of analgesic drugs, opioids or other pain relieving medications.[137]

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[133] *Quill*, *supra* note 114 at **2301.

[134] *Ibid* [ellipsis added].

[135] Quebec, Select Committee of the National Assembly of Quebec, "Dying With Dignity Consultation Document" (May 2010) (Chair: Geoffrey Kelley) online: National Assembly of Quebec < http://www.assnat.qc.ca > ; See e.g. *Rodriguez, supra* note 36 at para 25.

[136] *Ibid* (Justice Lamer had addressed "the fact that palliative care was inaccessible to a patient who was in immense agony due to "chronic illness", but not in the final stages of death at para 196); Select Committee, supra note 135 at 14.

[137] *Ibid;* See e.g. *Carter* BCSC*, supra* note 91 at para 201.

Research has shown that it is paramount to take notice that a problematic dimension of palliative care may occur when an extended form of the procedure involves inducing pain-subsiding substances in quantities in manners that conceivably provide for an accelerated termination of life.[138] For some, this extended form of palliative care can be perceived as an indirect form of physician-assisted death or even as euthanasia when the procedure concurrently hastens death.[139]

Studies have demonstrated that in discourses debating physician-assistance to dying it is not atypical for advocators of the procedure to address the similarities between physician-assisted death and the practice of palliative care and the possibility of a hastened death.[140]

Conceivably, a further argument supporting physician-assistance death might suggest that although the aforementioned practices produce simultaneous results, if death is truly the sought-after objective of the terminally-ill patient than perhaps physician-assisted suicide remains a safer procedure; the problem

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[138] *Ibid* at paras 198, 200; Select Committee, supra note 135 at 15.

[139] See e.g. *Carter* BCSC*, supra* note 91 at 186.

[140] *Ibid*.

that remains with palliative is that it offers minimal safeguards because palliative care is often an unregulated procedure.[141]

a. The Canadian Standing

In the Canadian *Rodriguez*[142] Supreme Court case the majority had addressed the issue that even if palliative care resulted in the hastening of death it was not to be perceived as a prohibited medical procedure.[143] The performing physician's "intention" played a key role in the Supreme Court's position.[144] In the case of palliative care, the doctor's intention was based on limiting or eliminating a patient's suffering, even if such consequences produces a quicker than anticipated death.[145] Contrarily, with physician-assisted suicide it was argued that the intention of the physician was strictly to cause death.[146]

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[141] *Ibid* at para 201.

[142] *Rodriguez*, *supra* note 36.

[143] *Ibid* at paras 25, 43, 57.

[144] *Ibid* at 57.

[145] *Ibid.*

[146] *Ibid.*

In contrast, the Supreme Court of Canada in its recent *Carter*[147] case had agreed with the Supreme Court of B.C.'s reasoning that because it is legal for a patient to seek palliative care, but illegal to ask for physician-assisted death this created a violation to the security right conferred by section 7 of the *Charter.*[148]

It is paramount to take notice that the majority of physician-assistance to death laws necessitates that palliative care be proposed as a medical substitute before a patient engages in physician-assistance to dying.[149] This requirement offers indispensable benefits because it may further palliative care's education, which would provide increased pain management solutions, and make palliative care more accessible to accommodate patients with various illnesses. [150] Paradoxically, this safeguard may foster a preventative solution to suicide and its assistance.[151]

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[147] *Carter v Canada (Attorney General),* 2015 SCC 5, [2015] 1 SCR 331 [*Carter* SCC].

[148] *Ibid at* para *45*; *Carter BCSC, supra* note 91; *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[149] See e.g. *Act Respecting End-of-Life Care*, CQLR 2014, c S-32.0001 at s 13 [*End-of-Life*].

[150] See e.g. *Carter, supra* note 91 at para 394(b)(ii) (referencing the *ODDA*).

[151] *Ibid.*

b. The American Standing

An examination of the legal standing of American palliative care was equally addressed in the Supreme Court *Glucksberg v Washington*[152], and *Vacco v. Quill*[153] physician-assistance to suicide cases. The Court in deciding whether or not physician-assisted suicide was a constitutional protected right had reviewed the possible distinctions and similarities between palliative care and its oft-inducement of a hastened death with physician assistance to suicide, but with less precision as in the Canadian Courts.[154]

For instance, it is interesting to take notice that Justice Souther in the *Glucksberg* Court had asserted that: "I accept here respondents' representation that providing such patients with prescriptions for drugs that go beyond pain relief to hasten death would, in these circumstances, be consistent with standards of medical practice",[155] but the Justice still had ruled against the permissibility of physician-assistance to suicide

[152] *Glucksberg*, *supra* note 114.

[153] *Quill, supra* note 114.

[154] See e.g. *Quill, supra* note 114 fn 6; See e.g. *Glucksberg*, *supra* note 114 at **2276.

[155] *Ibid.*

Chapter II – Jurisdictional Applications of Medical-Assistance to Dying Laws

To complement the aforementioned definitions and distinctions of various medical procedures in the assistance to dying realm, this segment will expose the North American jurisdictions where physician-assisted suicide has been rendered a legal and permissible practice, or at the very least a defensible procedure. This section will also acquaint the reader with the international domain of dignified death laws, which have and continue to serve as fast-forward contenders for their practices and philosophies. These European laws have oft-served as paradigms for North American assistance to dying debates and laws.

A. North America

1. The Country of Canada and the Province of Quebec

a. The *Rodriguez* Era

Historically, the Supreme Court of Canada's background on physician-assistance to suicide debates had debuted with the *Rodriguez v. British Columbia (A.G.)*[156] case where the Court had ruled that section 241*(b)* of the

[156] *Rodriguez, supra* note 36.

Criminal Code[157] - the former disposition that had governed the absolute ban to physician-assisted suicide - was constitutional, for it had not violated the *Canadian Charter of Freedoms and Rights.*[158]

A recall of the facts of the *Rodríguez* case reveals that the plaintiff / appellant Sue Rodriguez was a forty-two year old woman diagnosed with Amyotrophic Lateral Sclerosis – Lou Gehrig's disease - whose remaining life span ranged from two to fourteen months.[159] Although she was described as still being able to appreciate her existence the illness was causing her to degenerate quickly.[160] It was highly probable that she would have become permanently bedridden, that the use of a breathing respirator would have been vital and that a surgery-induced gastronomy would have been required for her intake of nourishment.[161]

Ms. Rodriguez had pleaded with the Supreme Court that when she had lost all her capacities and could no longer enjoy the quality of life due to her illness

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[157] *Criminal Code*, *Supra* note 55 at s. 241 *(b)*.

[158] *Ibid* ; *Rodriguez, supra* note 36; *Charter, supra* note 148.

[159] *Rodriguez, supra* note 36.

[160] *Ibid.*

[161] *Ibid.*

that she would be permitted to seek the assistance of a physician to help her die.[162] She had sought an order that would have declared section 241*(b)* of the *Criminal Code of Canada*[163] invalid due to its unconstitutional infringements on: section 7 of the *Canadian Charter of Freedoms and Rights*[164], which guarantees life, liberty and security of the person, section 12 of the *Charter*[165] that protects persons against cruel and unusual treatment or punishment, and section 15(1) of the *Charter*[166] the protection of equality rights.[167] In a 5-4 decision, the majority of the Supreme Court had denied Ms. Rodriguez' request.[168]

The ruling remained paradoxical, for even though Ms. Rodriguez's right to security of section 7 of the *Charter* "deprived [her] of autonomy […] and

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[162] *Ibid.*

[163] *Criminal Code*, *supra* note 55 at s 241*(b)*.

[164] *Charter, supra* note 148 ([e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice at s. 7).

[165] *Charter, supra* note 148 ([e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment at s 12).

[166] *Charter, supra* note 148 ([e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability at s. 15).

[167] *Rodriguez, supra* note 36; *Charter, supra* note 148 at ss 7, 12, 15.

[168] *Rodriguez, supra* note 36.

caused her physical and psychological pain in a manner impinging on the security of her person, [a]ny resulting deprivations, however, [were] not contrary to the principles of fundamental justice."[169]

The majority had also overlooked a conclusion pertaining to the right to life of section 7 of the *Charter*.[170] Whilst, section 12 of the *Charter* was found not to be relevant to the case at bar[171], and section 15(1) of the *Charter* was not decided upon; rather the majority of the court inferred that the provision was deemed violated, but that the violation was constitutional in accordance to section 1 of the *Charter*.[172]

Despite the majority upholding the prohibition to physician-assisted suicide the dissenting Justices' opinions had remained compelling for years.[173] Four judges were of the opinion that 241*(b)* of the *Code*[174] was unconstitutional.[175]

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[169] *Ibid* [ellipse, a coma & words added, words & a period omitted].

[170] *Rodriguez, supra* note 36 at para 7; *Charter, supra* note 148 at s 7.

[171] *Ibid* at s 12; *Rodriguez, supra* note 36 at paras 67, 68.

[172] *Ibid* at para 72; *Charter, supra* note 148 at s 15(1) & ([t]he *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by the law as can be demonstrably justified in a free and democratic society at s 1).

[173] *Rodriguez, supra* note 36.

[174] *Criminal Code*, *supra* note 55 at s 241*(b)*.

The first two Justices L'Heureux-Dube and McLachlin had found that s. 15(1) of the *Charter* and its equality rights were not to be applied to the case at bar, but were of the opinion that the right to security of the person of section 7 of the *Charter* was violated and could not be saved via the *Charter's* limitation clause.[176] Fundamentally, these Justices had reasoned that:

> Parliament has put into force a legislative scheme which does not bar suicide but criminalizes the act of assisting suicide. The effects of this is to deny to some people the choice to ending their lives solely because they are physically unable to do so. This deprives Sue Rodriguez of her security of the person […] in a way that offends the principles of fundamental justice, thereby violating s. 7 of the *Charter*. The violation cannot be saved under s. 1.[177]

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[175] *Ibid; Rodriguez, supra* note.

[176] *Ibid* at para 87; *Charter, supra* note 148 at ss 15(1), 7, 1.

[177] *Ibid* at ss 7, 1; *Rodriguez, supra* note 36 para 89.

The third judge was the late and former Chief Justice of the Supreme Court of Canada Judge Lamer, who had also declared 241*(b)* of the *Code* [178] unconstitutional, and who was willing to provide Ms. Rodriguez with a constitutional exemption to proceed with her request to undertake physician-assistance suicide.[179]

Justice Lamer did not rule on sections 7 or 12 of the *Charter*, thus limiting his conclusion solely on section 15(1) of the *Charter.*[180] During the justification of the impugned legislation he considered that the effects of provision 241*(b)* of the *Criminal Code of Canada*, which in accordance to the Justice "create[d] an inequality since it prevent[ed] persons physically unable to end their lives unassisted from choosing suicide when that option is in principle available to other members of the public without contravening the law […] [a] personal characteristic which is among grounds of discrimination listed in s.15(1) of the *Charter*."[181]

It is interesting to take notice that the concern for premature suicide was further addressed by Justice Lamer, who had taken notice of the possible impact that

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[178] *Criminal Code*, *supra* note 55 at 241*(b)*.

[179] *Ibid; Rodriguez, supra* note 36 at paras 235 – 245.

[180] *Ibid* at para 154; *Charter, supra* note at 148 at ss 7, 12, 15(1).

[181] *Ibid* at s 15(1); *Rodriguez, supra* note 36 at para 167 [letters & ellipsis added]; *Criminal Code*, *supra* note 55 at 241*(b)*.

the prohibition to physician-assisted suicide could create in Ms. Rodriguez' situation.[182] He had claimed that "[n]either party can guarantee that Ms. Rodriguez will in fact seek assistance to commit suicide at the point when she finds herself physically unable to terminate her life independently. She may choose to live out her life without intervention. She may choose to take her own life while she is still able to so unassisted."[183]

Lastly, Judge Cory was of the opinion that section 15(1) of the *Charter* was violated in regards to "handicapped terminally ill patients".[184] He had also insisted that section 7 of the *Charter* was infringed upon, through a qualitative argument of life and a belief that:[185]

> [D]ying is an integral part of living and, then as a part of life it is entitled to the protection of s. 7. It follows that the right to die with dignity should be as well protected as in any other aspect of the right to life. State prohibitions that would force a dreadful,

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[182] *Rodriguez, supra* note 36 at para 204.

[183] *Ibid* [capitalization omitted].

[184] *Ibid* at para 260; *Charter, supra* note at 148 at s 15(1).

[185] *Ibid* at s 7.

> painful death on a rational but incapacitated terminally ill patient are an affront to human dignity.[186]

b. The *Carter* Courts

The Supreme Court of Canada has recently declared the criminal dispositions associated with the prohibition to physician-assisted to dying unconstitutional.[187]

Two decades after Canada's *Rodriguez*[188] Supreme Court ruling, the physician-assisted suicide debate was once again decided upon in the British Columbia Supreme Court *Carter v. Canada (Attorney General)* case.[189]

The facts as established in the trial case are as follows: the plaintiffs – Lee Carter, Hollis Johnson, Dr. Schoichet, The British Columbia Civil Liberties Association and Gloria Taylor - had bought suit to have sections of the *Criminal Code of Canada* pertaining to the prohibition of physician-assisted

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[186] *Ibid* at para 257.

[187] *Carter* SCC, *supra* note 147.

[188] *Rodriguez, supra* note 36.

[189] *Carter* BCSC, *supra* note 91.

suicide - in particular section 241*(b)* and s. 14 of the *Criminal Code of Canada*[190] – declared unconstitutional and invalid.[191] The prominent plaintiffs consisted of Gloria Taylor, and Lee Carter and Hollis Johnson.[192]

Similar to Ms. Rodríguez' medical condition, Gloria Taylor was suffering from Lou Gehrig's disease - Amyotrophic Lateral Sclerosis.[193] Due to the "neurodegenerative" nature of this disease eventually she would have been left almost completely paralyzed.[194]

Having been subject to the care of strangers to help her complete personal matters she was scared that due to the "progression of her disease" that she would have no longer been self-reliant and would have become "bedridden"; thus "stripped of her dignity and independence".[195] Coupled with the facts that she had found "palliative care repugnant" and that Switzerland had offered the procedure for non-residents that she was unable to financially afford, she had

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[190] *Criminal Code*, *supra* note 55 at ss 14, 241*(b)*.

[191] *Ibid*; *Carter* BCSC, *supra* note 91 at paras 1, 22.

[192] *Ibid* at para 1.

[193] *Ibid* at para 47.

[194] *Ibid.*

[195] *Ibid* at para 52.

pleaded with the court to be granted permission to proceed with physician-assisted suicide in Canada.[196]

The trial justice had refused to conform to the majority ruling in the Supreme Court *Rodriguez*[197] case, and whilst she acknowledged several aspects of the dissent's rulings, Justice Smith had concluded that the absolute ban to physician-assisted suicide as governed by the *Criminal Code of Canada*[198] was unconstitutional.[199]

Thus, the British Columbia Supreme Court *Carter*[200] case presented itself as a landmark decision, not only for its ruling, but because Justice Smith did not feel compelled to abide to the legal traditional principle of Stare Decisis.[201] Under this legal principle previous Supreme Court decisions with same fact patterns and law issues are binding upon the lower courts.[202]

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[196] *Ibid* at para 53, 55.

[197] *Rodriguez, supra* note 36.

[198] Criminal Code, *supra* note 55.

[199] *Ibid*; *Carter* BCSC, *supra* note 91.

[200] *Carter* BCSC, *supra* note 91

[201] *Ibid* at paras 12 – 18.

[202] *Black's*, *supra* note 3, *sub verbo* "Stare Decisis".

It remains that notwithstanding the principle of Stare Decisis, since the *Rodriguez*[203] case new legal developments had emerged, for instance: the availability of "new evidence" of permissible dignified death regimes along with efficacious "safeguards to protect vulnerable individuals", which stemmed from different jurisdictions existed, the evolution of "new legal principles" encompassing the interpretation of the reasonable limitation clause of section 1 of the *Charter* had occurred, the concepts of "overbreath" and "grossly disproportionate" had been established in the "principles of fundamental justice" of s. 7 of the *Canadian Charter*, and along with the revival of certain "legal issues" that were never fully decided upon in the *Rodriguez* case, which rested on the equality rights per s.15 of the *Charter*[204] and the right to life of s.7 of the *Charter*.[205]

As such, Justice Smith had found that the absolute prohibition to the end-of-life medical procedure had violated Ms. Taylor's section 7 *Charter* rights to liberty and security of the person, and also her right to life.[206] The right to life was impugned because the lack of a permissible assistance to dying regime could

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[203] *Rodriguez, supra* note 36.

[204] *Charter, supra* note 148 at s 15.

[205] *Ibid* at ss 1, 7, 15; Leah McDaniel, "Carter v Canada (Attorney General) (2012): B.C. Court Rules that Ban on Assisted Suicide is Unconstitutional" at 3-4, online: University of Alberta, Center for Constitutional Studies < http://www.ualawccsprod.srv.ualberts.ca >.

[206] *Carter* BCSC, *supra* note 91 at para 17; *Charter, supra* note 148 at s 7.

have promoted Ms. Taylor to commit pre-mature suicide while she was still capable.[207] Judge Smith had also determined that Gloria's equality rights of section 15 of the *Canadian Charter* were violated because the legislation was discriminatory.[208] Basing this argument on the fact that Canadian law had not outlawed suicide, yet persons that were physically unable too and required assistance were not only incapable to commit suicide, but were equally prohibited to seek assistance to the procedure in accordance to Canadian law.[209] The Justice had granted a constitutional exemption for Ms. Taylor to undertake a physician-assistance to suicide procedure.[210]

The second set of prominent plaintiffs had consisted of Lee Carter and Hollis Johnson - daughter and son-in-law - of the deceased Kathleen Carter, who had previously suffered from Spinal Stenosis.[211] The disease had accelerated and had caused Ms. Kathleen Carter to lose all her independence.[212] She was left with very limited mobility and had decided that she wanted to end her life

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[207] *Ibid; Carter* BCSC, *supra* note 91 at para 17.

[208] *Ibid* at para 15; *Charter, supra* note 148 at s 15.

[209] *Ibid* at para 15.

[210] *Ibid.*

[211] *Ibid* at para 57 et s.

[212] *Ibid.*

through physician-assistance to dying.[213] Kathleen knew that physician-assisted suicide was a federal crime in Canada and had proceeded to ask her daughter and son-in-law to help her with medical-assisted suicide arrangements in Switzerland.[214] Despite their knowledge that they could have been prosecuted in Canada, for aiding and abiding Kathleen, both Lee and Hollis had accepted to help her.[215] Kathleen had died an accompanied death at Dignitas in Switzerland, but at a cost of $32, 000.00.[216]

Lee and Hollis were not accused of aiding and abiding with Kathleen's assisted suicide request, but nonetheless had communicated their beliefs to the court that Kathleen should have been able to proceed with physician-assisted suicide in Vancouver, Canada, and not to have been subject to the inconveniences that Kathleen encountered with an overseas death.[217] Justice Smith had found that the plaintiffs, Lee Carter and Hollis Johnson, were not guilty for aiding Lee Carter's Mother in her pursuit and in her undertaking of physician-assisted suicide at Dignitas in Switzerland; ruling that the prohibition

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[213] *Ibid.*

[214] *Ibid* at para 63.

[215] *Ibid* at para 63.

[216] *Ibid* at para 70.

[217] *Ibid* at para 71.

to physician-assisted suicide had violated Carter and Johnson's right to liberty of section 7 of the *Canadian Charter* due to the "risk of incarceration" that the absolute prohibition had created in helping Kathleen Carter to undertake an accompanied death in Switzerland.[218]

The outcome of the *Carter* British Columbia Supreme Court decision was challenged in front of the British Columbia Court of Appeal,[219] where the majority of the court had overruled Justice Smith's decision.[220] Leaning on a traditional-based point-of-view of the law and the Constitution, the majority was not impressed with Justice Smith's ruling, and had declared that the courts of law must be conservatively observant and obedient of the principle of Stare Decisis.[221] Ruling that in Canadian physician-assisted suicide's legal arena the *Rodriguez*[222] precedent was binding.[223] The *Carter* Court of Appeal decision had inevitably found its path towards the Supreme Court of Canada.[224]

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[218] *Ibid* at para 17; *Charter, supra* note 148 at s 7.

[219] *Carter* BCCA, *supra* note 91.

[220] *Ibid.*

[221] *Ibid* at para 316.

[222] *Rodriguez, supra* note 36.

[223] *Carter* BCCA, *supra* note 91 at para 316.

[224] *Carter* SCC, *supra* note 147.

In the Supreme Court *Carter*[225] case the Court had concluded that the trial justice was not compelled to follow the *Rodriguez* precedent.[226] They had agreed with Justice Smith and her arguments that the principle of Staris Decisis did not have to be honored; for "a new legal issue was raised", and there existed "a change in circumstances or evidence" that were now available since *Rodriguez*.[227] The court had noted that:

> Both conditions are met [..] . The trial judge explained her decision to revisit *Rodriguez* by noting the changes in both the legal framework for s. 7 and the evidence on controlling the risk of abuse associated with assisted suicide.[228]

It appears that this reasoning demonstrated that the Supreme Court had ceased to agree with Justice Sopinka's statement in the *Rodriguez*[229] case that "no

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[225] *Ibid.*

[226] *Ibid* at para 45*; Rodriguez, supra* note 36.

[227] *Ibid* at para 44.

[228] *Ibid* at para 45; *Rodriguez, supra* note 36; *Charter, supra* note 148 s 7.

[229] *Rodriguez, supra* note 36.

other Western democracy expressly permitted assistance to dying."[230] For the Supreme Court had pointed out that although the norm is the prohibition of such a practice, citing the American *Glucksberg*[231] and *Quill*[232] cases, nonetheless eight jurisdictions now permitted "some form of assisted dying".[233] Evidencing the advancement that had transpired in the realm of assistance to dying over the decades.

The Supreme Court of Canada had unanimously ruled that section 241*(b)* of the *Criminal Code of Canada*[234]*,* along with s. 14 of the *Criminal Code of Canada*[235], which had addressed the illegality of consenting to having termination of life bestowed upon oneself, as violating section 7 of the *Canadian Charter of Rights and Freedoms.*[236]. The Court had reasoned that

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[230] *Carter* SCC, *supra* note 147 at para 8.

[231] *Glucksberg, supra* note at 114.

[232] *Quill, supra* note at 114.

[233] *Carter* SCC, *supra* note 147 at para 8, 9.

It is paramount to observe that there are presently seven American jurisdictions that have permitted the practice. *Infra* notes 292-299.

[234] *Criminal Code*, *supra* note 55 at s 241*(b)*.

[235] *Ibid* at s 14.

[236] *Ibid* at s 14, 241*(b)*; *Carter* SCC, *supra* note 147. *Charter*, *supra* note 148 at s 7.

section 241*(b)* of the *Criminal Code* was "overbroad", and was "not directed at preserving life, or even at preventing suicide […]",[237] and "in some cases not connected to the objective of protecting *vulnerable* people".[238] Canada had attempted to convince the Court that the objective of the absolute ban to the medical procedure was the protection of vulnerable members of society.[239]

It is paramount to further note that the Justices had also found that the right to security and liberty of s. 7 of the *Charter* were violated by rationalizing that:

> An individual's response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy. The law allows people in this situation to request

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[237] *Carter* SCC*, supra* note 147 at paras 78.

The Attorney General of Canada had agued that it was an impossibility to distinguish the "vulnerable", and as a result the prohibited physician-assisted suicide law was not overbroad,

the Supreme Court was not in accordance, and had mentioned that the physician-assisted dying situation was "analogous" to the *Canada (Attorney General) v. Bedford* case, which had stuck down Canada's prostitution laws: noting, s. 212(1)*(j)* of the *Criminal Code* - the prohibition on living on the avails of prostitution - because it was overbroad, the Court had stated that "(t)he law in that case punished everyone who earned a living through a relationship with a prostitute, without distinguishing between those who would assist and protect them and those who would be at least potentially exploitive of them", the *Bedford* case had established new principles of fundamental justice: arbitrariness, overbreath and gross disproportionality.

See *Carter* SCC*, supra* note 147 at paras at 87, 88; *Canada (Attorney General) v. Bedford,* 2013 SCC 72, [2013] 3 SCR 1101.

[238] *Carter* SCC*, supra* note 147 at para 86.

[239] *Ibid* at para 87.

> palliative sedation, refuse artificial hydration and nutrition, or request the removal o life-sustaining medical equipment, but denies them the right to request physician-assistance in dying. This interferes with their ability to make decisions concerning their bodily integrity and medical care and thus trenches on their liberty. And by leaving people like Ms. Tayor to endure intolerable suffering, it impinges on their security of the person.[240]

Most importantly, for proponents to physician-assisted suicide the Supreme Court concluded that:

> [S.] 241 (*b)* and s.14 infringe […] s. 7 [of the *Charter*] rights of life, liberty and security of the person in an manner that is not in accordance with the principles of fundamental justice, and that the infringement is not justified under s.1. […] The appropriate remedy is therefore a declaration that s. 241*(b)* and s. 14 of the

[240] *Carter* SCC*, supra* note 147 at para 66.

> *Criminal Code* are void insofar as they prohibit physician-assisted death [physician-assisted suicide and voluntary euthanasia] for a competent adult person who (1) clearly consents to the termination of life and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition.[241]

The *Carter* Court put an end to the *Rodriguez* precedent that had previously banned Canadian physician-assisted suicide.

c. The Province of Quebec

Studies of the Province of Quebec's medical end-of-life laws have shown that it was the first Canadian province to have legalized medical-assistance to dying; the National Assembly's Select Committee, which had proposition

[241] *Ibid* at paras 126, 127; *Criminal Code, supra* note 55 at ss 14, 241*(b)*; *Charter, supra* note 148 s 7 [capitalization, ellipses and words added].

assistance to dying through the *Dying With Dignity* Report[242] and *Bill 52*[243] has adopted an *Act Respecting End-of–life Care*[244] as law.[245]

It is paramount to observe that Quebec's end-of–life procedure is referred to as "medical aid in dying"[246]; a medical end-of life procedure that has been presented as "not consist[ing] of an euphuism designed to refer to either euthanasia or to assisted suicide".[247]

The procedure has been portrayed as a unique medical practice designed to involve the entire medical personnel in the assistance-to-dying process in order to avoid any lapses or sentiments of isolation for the terminal-ill patient.[248] Nonetheless, due to its transparency the procedure is in fact euthanasia because

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[242] Quebec, Select Committee of the National Assembly of Quebec, "Dying With Dignity Report" (March 2012) (Chair: Maryse Gaudreault) [Select Committee Report] online: National Assembly of Quebec < http://www.assnat.qc.ca >.

[243] Quebec *Bill 52, An Act respecting end-of-life care*, 1st sess, 40th Leg, Quebec 2013 [*Bill 52*].

[244] *End-of-Life, supra* note 149.

[245] *Ibid;* Quebec, Select Committee Report, supra note 243; *Bill 52*, *supra* note 244.

[246] Select Committee Report, supra note 243 at 76; *End-of-Life, supra* note 149 at art 3(6).

[247] Martin Ouellet, "Québec dépose son projet de loi sur euthanasie" (June 12, 2013) [translated by the author], online: La Presse < http://www.lapresse.ca >.

[248] Select Committee Report, supra note 242 at 76.

the law indicates that the physician administers the lethal medication.[249]

An extended examination of Quebec's dying with dignity law has shown that it does not include categories of individuals suffering with physical disabilities, who are suffering unbearably, but that are only at the final stage of their "end of life;[250] whilst, the *Carter*[251] Supreme Court had ruled that such needs are to be covered by the federal law.[252] It is also imperative to also indicate that an *Act Respecting End-of–life Care*[253] is available only to residences of the Province of Quebec.[254]

A final alleged distinction between the Quebec and the Federal regime is that the former legislation also stems to heighten the objective of strengthening Quebec's palliative care system.[255] The Province of Quebec's legalization of

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[249] *End-of-Life, supra* note 149 at art 3(6).

[250] *Ibid* at art 26(3).

[251] *Carter* SCC*, supra* 147.

[252] *Ibid.*

[253] *Supra* note 149.

[254] *Ibid* at 26 (1).

[255] See e.g. *End-of-Life, supra* note 149 ([a] palliative care hospice and an institution must specify […] the nature of the services […] the monitoring systems that will allow the institution […] to ensure that quality care is provided […] at art 14) [ellipses & emphasis added & bold letters omitted].

"medical aid in dying" further merits its justification because the permissibility of the law possibly will hopefully provide a state-of-the-art alternative to physician-assisted death, which further qualifies as a prevention measure.

2. The United States

a. The United States Supreme Court Decisions

A review of the legal history of American federal physician-assisted suicide cases has revealed that in the United States the constitutionality of the State of Washington and the State of New York laws prohibiting physician-assisted suicide was upheld by the Supreme Court of the United States, in simultaneously heard cases; *Washington v. Glucksberg*[256] and *Vacco v. Quill*[257]. In both cases, the highest court of the land had ruled that in the American Federal Constitution there existed no constitutional protection to the right to physician-assisted suicide; basically conferring the decision to legalize or prohibit the practice of physician-assisted suicide within the competencies of each and every individual State.[258]

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[256] *Glucksberg*, *supra* note 114.

[257] *Quill, supra* note 114.

[258] *Ibid; Glucksberg*, *supra* note 114.

i. *Vacco v. Quill*

Per a previous discussion in this dissertation, the *Quill*[259] case questioned the constitutionally of a New York statute that prohibited physician-assisted suicide.[260] The case was argued on the basis of the *Fourteenth Amendment of the U.S. Constitution*[261], more specifically via the Equal Protection Clause.[262]

The respondents - several New York doctors, Dr. T.E. Quill, Dr. S. C. Klagsbrun and Dr. H. A. Grossman, and three terminally-ill individuals that had passed away - had argued that the New York ban was unconstitutional because it violated the *Fourteenth Amendment Equal Protection Clause*.[263] The main respondent - Dr. Timothy Quill, a palliative care specialist – had contended that the right-to refuse life-sustaining medical treatment and a patient requesting a right-to-die conferred no difference.[264] The U.S. Supreme

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[259] *Quill, supra* note 114.

[260] *Ibid.*

[261] *Ibid; U.S. Const. amend XIV*.

[262] *Ibid; Quill, supra* note 114.

[263] *Ibid; U.S. Const. amend XIV*.

[264] *Quill, supra* note 114.

Court in an unanimous ruling found that the N.Y. prohibition was not unconstitutional and that there existed no constitutionalized right-to die.[265]

ii. *Washington v. Glucksberg*

Upon recalling the facts in *Glucksberg*[266], the case primarily focused on three anonymous patients, who suffered from terminal illnesses, along with Doctor Harold Glucksberg and his colleagues of doctors.[267] They had contested a Washington law that prohibited physician-assisted suicide on the grounds that it violated the constitutionally protected liberty interest of the Due Process Clause of the *Fourteenth Amendment of the United States Constitution*.[268]

On behalf of the Supreme Court majority, Judge Rehnquist had examined the constitutionality of the Washington law by primarily probing the "Nation's history, legal traditions and practices".[269] The Justice had found that the common practice of prohibiting assisted suicide stemmed from "longstanding expressions of the States' commitment to the protection and preservation of all

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[265] *Ibid.*

[266] *Glucksberg*, *supra* note 114.

[267] *Ibid.*

[268] *Ibid; U.S. Const. amend XIV.*

[269] *Glucksberg, supra* note 114 at *710; Zoller, supra note 4 at 1258.

human life"[270]; basing his reasoning upon "States' assisted-suicide bans", and "Anglo-American common-law tradition" that had perceived suicide and assisted suicide as being crimes.[271]

According to Justice Rehnquist this tradition originated as early as seven centuries ago it was later embraced by "American Colonies" and followed by the "colonial and early state legislatures", who removed the criminal status from suicide, but nevertheless retained the impermissibility of assistance to suicide.[272] Eventually, with the ratification of the *Fourteenth Amendment of the United States Constitution*[273] the majority of the states had declared suicide assistance an illegal act, which presumably became "deeply rooted" in the American Nation.[274]

Subject to previous pages of this thesis, it is interesting to note that the *Glucksberg*[275] respondents had submitted to the Supreme Court the *Cruzan v.*

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[270] *Ibid*; *Glucksberg, supra* note 114 at *710.

[271] *Ibid* at *710, *711; Zoller, supra note 4 at 1258, 1259.

[272] *Ibid* at 1260; *Glucksberg, supra* note 114 at *712, *713.

[273] *U.S. Const. amend XIV.*

[274] *Glucksberg, supra* note 114 at *715*;* Zoller, supra note 4 at 1259.

[275] *Glucksberg, supra* note 114.

Director, Missouri Department of Health[276]precedent, and had also presented the *Planned Parenthood of Southern Pennsylvania v. Casey*[277] case; a decision, which had involved the issue of the constitutionality of abortion provisions.[278] Leaning on both of these precedents the *Glucksberg* respondents had argued "the existence of a liberty interest protected by the Fourteenth Amendment which extends to a personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide".[279]

Justice Rehnquist had acknowledged that the Fourteenth Amendment Due Process safeguarded the constitutional "fundamental rights and liberty interests" in the *Cruzan*[280] and *Planned Parenthood*[281] cases;[282] decisions that

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[276] *Cruzan, supra* note 84.

[277] 505 U.S. 833 (1992) [*Planned Parenthood*].

[278] *Ibid*; *Glucksberg, supra* note 114 at *726; *Cruzan, supra* note 84.

[279] *Glucksberg, supra* note 114 at *724, *726 *Cruzan, supra* note 84; *Planned Parenthood, supra* note 277.

[280] *Cruzan, supra* note 84.

[281] *Planned Parenthood, supra* note 277.

[282] *Ibid; Cruzan, supra* note 84; *Glucksberg, supra* note 114 at *724 - *726.

encapsulated both the traditional right to refuse unwanted lifesaving medical treatment[283] and the right to undertake abortion procedures.[284] Whilst, further adding the usage of contraception - amongst additional safeguarded liberties.[285] Paradoxically, these non-enumerated end-of-life practices were conferred constitutional protections, but Rehnquist did not extend the protection to include physician-assisted suicide.[286]

It appears that the Justice remained centered on the history and tradition-based test of Substantive Due Process to determine that physician-assisted suicide was not an unenumerated constitutional protected right worthy of constitutional protection for it was not "so rooted in the traditions and conscience of our people to be ranked as fundamental".[287] Writing for the majority of the

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[283] *Ibid* at *724*; Cruzan, supra* note 84; *Planned Parenthood, supra* note 278.

[284] *Glucksberg, supra* note 114 at *724 - *726; *Planned Parenthood, supra* note 277; Toro, supra note 13 (in the *Roe v Wade* case "the Court did not use the deep roots test", but "appealed to historical attitudes to reinforce its holding that the Due Process Clause protects the right to abortion […]" at 182) [ellipsis added]; *Roe v Wade,* 410 US 113 (1973); Zoller, supra note 4 at 1261.

[285] See *Griswold v Connecticut* 381 U.S. 479 (1965) cited in *Glucksberg, supra* note 114 at *720; Zoller, supra note 4 at 1261.

[286] *Ibid* at 1258; *Glucksberg, supra* note 114 at *720, *724 - *726.

[287] *Glucksberg, supra* note 114 at *720, *721; Zoller, supra note 4 at 1258.

Supreme Court, the Justice had conjured that the courts of law of the United States:

> [H]a[ve] always been reluctant to expand the concept of substantive due process […]. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field" […]. Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's' history and tradition", […] and "implicit in the concept of ordered liberty", such that "neither liberty nor justice would exist if they were sacrificed" […]. Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest […]. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible

> decision making" […] that direct and restrain our exposition of the Due Process Clause.[288]

Thus, in accordance to Rehnquist's analysis the categorical inclusion of physician-assisted suicide failed the "deep roots test", notwithstanding that prior to the *Glucksberg* physician-assistance to suicide Supreme Court decision several unenumerated bodily control rights were found to be "deeply rooted in the Nation's history and traditions" and were conferred a constitutional shield.[289]

b. The Individual States and District

Studies have revealed that in the aftermath of the Supreme Court rulings the prevailing legal status of American physician-assisted suicide since the time that the *Glucksberg*[290] and *Quill*[291] cases arose has indicated that the medical

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[288] *Glucksberg, supra* note 114 at *720, *721 [capitalization, word & ellipses added]; Zoller, supra note 4 at 1258.

[289] *Glucksberg, supra* note 114; Toro, supra note 13 at 177; Zoller, supra note at 1261.

[290] *Glucksberg, supra* note 114.

[291] *Quill, supra* note 114.

procedure is legally permissible in seven American jurisdictions.[292] These include the State of Oregon[293], the State of Washington[294], the State of Montana[295], the State of Vermont[296], the State of California[297], the State of Colorado[298] and the District of Columbia[299].

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[292] "Death With Dignity Acts", online: Death with Dignity < http://www.deathwithdignity.org > [DWD Acts].

[293] *Death with Dignity Act*, Oregon Rev Stat 70.245 (1994) [Oregon Act]; Oregon. Gov, "Death With Dignity Act", online: Oregon Health Authority < http://www.oregon.gov > [Oreg Gov DWDA]; DWD Acts, supra note 292; "Oregon", online: Death with Dignity < http://www.deathwithdignity.org >.

[294] *Death with Dignity Act*, Wash Rev Code 70.245 (2009) [Washington Act]; DWD Acts, supra note 292; "Washington", online: Death with Dignity < http://www.deathwithdignity.org >; Washington State Legislature, *The Washington Death With Dignity Act*, online: < http://www.apps.leg.wa.gov > [Wash St Legis WDWDA].

[295] See *Baxter v Montana*, MT DA 09-0051, 2009 MT 449 (Dec 31, 2009) [*Baxter*]; DWD Acts, supra note 293; "Montana", online: Death with Dignity < http://www.deathwithdignity.org >.

[296] Vermont Act 39 *An Act Relating to Patient Choice and Control at End of Life* (S-77) (2013) [Vermont Act]; DWD Acts, supra note 292; "Vermont", online: Death with Dignity < http://www.deathwithdignity.org >.

[297] *End of Life Options Act ABX2-15 (AB-15)* [443-443.22] (*Part 1.85 added by Stats 2015, 2nd Ex Sess, Ch 1, Sec 1*) (2016) [California Act]; DWD Acts, supra note 292; California Legislative Information, End of Life, online: < http://www.leginfo.legislature.ca.gov >; "California", online: Death with Dignity < http://www.deathwithdignity.org >.

[298] *Colorado's End of Life Option Act,* [25-48-101 - 25-48-123] (2016) [Colorado Act], online: Wayne W. Williams, Colorado Secretary of State < http://www.sos.state.co.us >; DWD Acts, supra note 292; "Colorado", online: Death with Dignity < http://www.deathwithdignity.org >.

[299] *Death With Dignity Act of 2016* D.C. Act 21-577 (2017) [D.C. Act]; DWD Acts, supra note 293; "District of Columbia", online: Death with Dignity < http://www.deathwithdignity.org >.

It is essential to take notice that the practice of euthanasia remains illegal in all U.S. States.[300]

In the following paragraphs, each state and district that have provided for permissible physician-assisted suicide procedures will be individually, but briefly examined.

i. The State of Oregon

An examination of American physician-assisted suicide laws has shown that the State of Oregon was the first American state to legally provide physician-assistance to suicide.[301] The present legislation is known as the *Oregon Death With Dignity Act*[302].

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[300] See e.g. DWD Acts, supra note 292. Euthanasia *sub verbo* "Terminology of Assisted Suicide", on the Death with Dignity website there is opposition to the term "Active euthanasia" and also to "[Physician] Assisted Suicide," while these terms have been replaced with modern classifications, such as "Physician-Assisted Death" or "Death with Dignity", it remains that in theory these latter terms are umbrella terminologies that include physician-assisted suicide and euthanasia, but it paramount to read the definition of euthanasia - with exception to "passive euthanasia", which in the United States appears to be more commonly referred to as the right to refuse life-sustaining medical treatment - which is in practice banned in the United States. [word added].

[301] Oregon Act, *supra* note 293; Oregon, supra note 293; "Oregon Death with Dignity Act: A History", online: Death with Dignity < http://www.deathwithdignity.org > [ODWDA History].

[302] Oregon Act, *supra* note 293.

A review of the history of the law has revealed that the majority of Oregon residents in November 1994 had voted and supported *Measure 16*[303]. This further encouraged Oregon's lawmakers to draft legislation and in 1997, the *Oregon Death With Dignity Act*[304], was sanctioned, which rendered a permissible option that stemmed from an incurable individual, with a "terminal disease" to acquire lethal drugs to proceed with self-assisted suicide.[305]

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[303] ODWDA History, supra note 301.

[304] Oregon Act, *supra* note 293.

[305] *Ibid*; Oreg Gov DWDA, supra note 293.

Despite the legalization of the *Oregon Death with Dignity Act* it has been suggested that attempts to keep dignified death a non-legalized institution would increase, especially amongst jurisdictions that have approved or tolerated the practice. This assumption was evidenced in the *Gonzales v Oregon* decision.

In this case, former United States Attorney General John Ashcroft, under the *Controlled Substances Act* - a federal drug policy for controlled substances – had sought to prevent physicians from prescribing authorized medication for the State of Oregon's permissible physician-assistance to suicide.

Ashcroft had issued an Interpretative Rule declaring that prescribing federally-controlled lethal medication for physician-assistance to suicide was not a "legitimate medical purpose", and that physicians who proceeded with the prescribed procedure would be in violation of the *Controlled Substances Act*.

Most interestingly, the court had revealed that during Ashcroft's call as Senator the former Attorney General had promoted his restrictions to physician-assistance to dying.

Justice Kennedy for the majority of the United States Supreme Court had ruled that the former United States Attorney General under the *Controlled Substances Act* could not prevent physicians from prescribing authorized medication for legalized physician-assisted suicide; the Interpretative Rule was declared invalid and Oregon's Death with Dignity Act prevailed.

See *Gonzales v Oregon,* 546 US 243 (2006).

A review of the law has demonstrated that the Oregon Statute provides for stringent formalities, such as: the requirement of informed and written consent from the patient who desires to undertake the procedure and who requests the death-induced drugs, mandatory counseling to detect the possibility of mental incompetency that would bar the terminally-ill patient from accessing the procedure, and the preliminary requirement to recommend other end-of-life measures as alternatives, such as palliative care.[306]

ii. The State of Washington

The State of Washington followed in the path of the State of Oregon, and further adopted a medical-assistance to suicide's regime.[307] Washington's physician-assisted suicide law is referred as the *Washington Death with Dignity Act*[308].

Historically, the path to legalize Washington's physician-assisted suicide has shown that a first ballot – Washington Aid-in-Dying, *Initiative 119* - was

[306] See e.g. Oregon Act, *supra* note 293 at ss 2.01, 2.02, 3.01(c)(d)(e); Oreg Gov DWDA, supra note 293.

[307] DWD Acts, supra note 292; Washington, supra note 294.

[308] Washington Act, supra note 294.

rejected in 1991.[309] In 2008, a second attempt entitled *Initiative 1000* was "successful".[310] This resulted in the enactment of a statute entitled the *Washington Death with Dignity Act*[311], which was effective as of 2009.[312] The Washington Act is a mirror-like reflection of the Oregon Act.[313]

iii. The State of Vermont

As of May 2013, an addition to American jurisdictions that have accepted the necessity of offering the choice to a terminally-ill patient to undertake physician-assisted suicide has included the State of Vermont.[314]

This State's approval was a result of imposed state legislation by the "Vermont State Legislature".[315] The law is referred to as *An Act Relating to Patient*

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[309] McGough, Peter M. "Washington State Initiative 119: The First Public Vote on Legalizing Physician-Assisted Death" (1993) 2:1 Cambridge Quarterly of Healthcare Ethics 63 at abstract.

[310] Washington, supra note 294.

[311] Washington Act, supra note 294.

[312] *Ibid;* Washington, supra note 29.

[313] Washington Act, supra note 294; Washington, supra note 294; Oregon Act, supra 293.

[314] Vermont Act, supra note 296; DWD Acts, supra note 292; Vermont, supra note 296.

[315] *Ibid.*

Choice and Control at End of Life[316], and was signed by Governor Peter Schumlin on May 20, 2013; it is commonly referred to as the *Vermont Patient Choice and Control at End of Life.*[317]

The "Vermont law" resembles the "Oregon and Washington Death with Dignity Acts".[318]

iv. The State of Montana

It is essential to take notice thus far that the acknowledgement and legalization of physician-assisted suicide has been evidenced through both state ballot votes and state legislation. However, there is a court ruling that has also recognized the need for assistance to dying as with the case, *Baxter v. Montana.*[319]

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[316] Vermont Act, supra note 296.

[317] Vermont, supra note 296.

[318] Vermont Act, supra note 296; Oregon Act, supra note 293; Washington Act, supra note 294

[319] *Baxter, supra* note 295; DWD Acts, supra note 292; Montana, supra note 295; Kristine S. Knaplund, "Montana Becomes Third U.S. State to Allow Physician Aid in Dying", (2010) ABA Section on Real Property, Trust and Estate Law eReport at 1, online: Pepperdine Law < http://www.law.pepperdine.educ >.

Thus, the State of Montana's assistance to dying legal status differs, for there is no outright and direct legalization of physician-assisted suicide.[320] Instead, a court ruling has provided this State with a dying assistance recognition, which confers to physicians a defense against criminal prosecutions when performing assistance to suicide procedures per the consent of a "mentally competent" patient.[321]

In the Montana Supreme Court *Baxter v. Montana*[322] case, plaintiffs included an elderly man, Robert Baxter - who was suffering from "lymphocytic leukemia with diffused lymphadenopathy" and whose medical treatments were ineffective - four doctors, and the organization "Compassion & Choices".[323] They had contested "the constitutionality of the application of Montana homicide statutes to physicians who aid in dying to mentally competent, terminally ill patients and alleged that patients have a right to die with dignity under the Montana Constitution […] which address[es] individual dignity and privacy".[324]

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[320] *Baxter, supra* note 295*;* DWD Acts, supra note 292.

[321] *Baxter*, *supra* note 295; Montana, supra note 295; DWD Acts, supra note 292; Knaplund, supra note 319 at 1.

[322] *Baxter, supra* note 295.

[323] *Ibid* at paras 5, 6.

[324] *Ibid* at para 6 [ellipsis & letters added].

The Supreme Court of Montana ruled that a Montana "competent terminally ill" resident, who voluntarily consents to a dignified death "did not violate public policy", as a result the "statutory defense" of consent could constitute as being valid to ward off a "homicide charge".[325] This court came to this decision not by basing itself on "constitutional grounds", but on Montana's *Terminally Ill Act*, which was found not to hinder nor deviate from fulfilling the desires of a patient's request for his/hers final days.[326] Thus, reasoning that physician-assistance to dying through a prescription of a drug-induced death, and not the administration as such by a physician was not contrary to the *Terminally Ill Act*; more specifically the *Act* allowed for the withdrawal from "life sustaining" medical treatment.[327] In addition, it was noted that "[n]either [mercy killing nor euthanasia] […] is consent-based, and neither involved a patient's autonomous decision to self-administer drugs that will cause his own death."[328]

It is interesting to observe that a review of the history of this case has further demonstrated that even though both the District Court and the Supreme Court

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[325] *Ibid* at paras 12, 13.

[326] *Ibid* at para 28 et s; *Terminally Ill Act*; Knaplund, supra note 319 at 4.

[327] *Ibid* at 4; *Terminally Ill Act; Baxter, supra* note 295 at 28 et s.

[328] *Ibid* at para 36; Knaplund, supra note 319 at 5.

of Montana did support physician-assisted suicide, only the former court reasoned on constitutional grounds.[329]

v. The State of California

Evidence that supports the continual expansion of the legalization of American physician-assistance to suicide has revealed that one of the latest state members to enjoin permissible dignified death has encompassed the State of California, with the *End of Life Options Act*[330].

As of October 5, 2015, Governor Jerry Brown has signed into legislation the Californian *End of Life Options Act*, which became effective as of June 9, 2016.[331] This law legally authorizes medical-aid in dying subject to stringent conditions and formalities.[332]

It is paramount to take notice that unlike other jurisdictions that have legalized medical-assistance to dying, the State of California as added an additional safeguard that requires patients that are to undertake the medical procedure to

[329] *Baxter, supra* note 295 at para 51 [capitalization & ellipses added].

[330] California Act, supra note 297.

[331] California, supra note at 297; Death With Dignity in California: A History, online: Death with Dignity < http://www.deathwithdignity.org > [CDWDA History].

[332] California Act, supra note 297.

complete "the final attestation form […] within 48 hours prior to the qualified individual choosing to self-administer the aid-in-dying drug."[333]

vi. The State of Colorado

As of December 16, 2016, the State of Colorado's medical-assistance to dying law became effective.[334] The law is referred to as the *End of Life Option Act*.[335] A brief review of the history of the law has revealed that "[o]n November 8, 2016, Colorado voters passed Proposition 106, the End of Life Option Act, at the ballot by 65 to 35 percent (or 2 to 1) margin."[336]

vii. District of Columbia

The District of Columbia is the newest American "jurisdiction" to have legalized assistance to death.[337] On "February, 18, 2017" the law became

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[333] *Ibid* at s 443.5 (a)(12) [ellipsis added].

[334] DWD Acts, supra note 292; Colorado, supra note 299.

[335] D.C. Act, supra note 299.

[336] Colorado, supra note 299.

[337] DWD Acts, supra note 292; District of Columbia, supra note 300.

effective, and is referred to as the District of Columbia's *Death With Dignity Act*.[338]

The Death With Dignity National Center[339] has pointed out that "[t]he proposed 2018 federal budget blocks funding for the Act's reporting requirements. If passed, the budget would effectively nullify the D.C. law."[340] Thus, it would appear that the long-term status of the law presently remains unclear.

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[338] *Ibid;* D.C. Act, supra note 300.

[339] "Death with Dignity National Center", online: Death with Dignity < http://www.deathwithdignity.org >.

[340] District of Columbia, supra note 300.

B. International

Referencing international medical-assistance to dying laws in judicial discourses debating the legality of North American physician-assisted suicide has become a common practice.[341] As such, this section will briefly explore international medical-assisted death laws that have been legalized or jurisdictions that have decriminalized assistance to dying procedures.

It is important to note that some European *confreres* have recognized both physician-assisted suicide and voluntary active euthanasia procedures, these jurisdictions include: the Netherlands[342], Belgium[343] and Luxembourg[344].

1. The Swiss Confederation

Switzerland has decriminalized assisted suicide and remains favorable only to physician-assisted suicide, whilst euthanasia remains illegal.[345] Switzerland

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[341] See e.g. *Carter* BCSC*, supra* note 91 at paras 456, 508, 605, 606.

[342] *Termination of Life on Request and Assisted Suicide (Review Procedures) Act*, *2002, Stb.* 2001, 194 [The Dutch Act].

[343] The Belgian *28 May 2002 Act on Euthanasia,* BS 22 June 2002 *modified* Feb. 2014 [Belgian Act].

[344] *Law of 16 March 2009 on Euthanasia and Assisted Suicide,* Memorial A-No. 46, 16 March 2009 [Luxembourgish Act].

[345] See *Swiss Penal Code* (S.R. 311.0) article 114; See e.g. Dignitas, (in accordance to Dignitas' Lexicon the definition of "*Direct active euthanasia on express request (voluntary euthanasia*", per article 114 of the *Swiss Penal Code*, "killing on request" remains illegal*),*

also tolerates the undertaken of the procedure by non-medical organizations, including altruistic[346] end-of life measures, such as Dignitas[347].

Additionally, and in contrast to other jurisdictions that have recognized the acceptance of medical-assistance to dying, Switzerland is renown for its "suicide tourism".[348] Holding no residency requirements to undertake the dignified death procedure,[349] Switzerland captures the attention of individuals wishing to obtain assistance to terminate their human existence, who either live in jurisdictions that do not permit the legalization of such,[350] or due to medical-assisted death laws that require domiciled perquisites in order to obtain a home-based dignified death.[351]

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online: Dignitas - To live with dignity - To die with dignity < http:// www.dignitas.ch > [Dignitas].

[346] *Ibid* ((in accordance to Dignitas' Lexicon under the meaning of "*Assistance (by physicians or others)*", article 115 of the *Swiss Penal Code* stipulates that "assistance is legal as long as anyone abetting or helping another person to commit suicide does not have any selfish motives").

[347] *Ibid.*

[348] Saskia Gauthier et al, "Suicide tourism: a pilot study on the Swiss phenomenon", online: (2015) 41 Journal of Medical Ethics 611 < http://www.jme.bmj.com >; Jacques Wilson, " 'Suicide tourism' to Switzerland has doubled since 2009 ", online: CNN, < http://www.cnn.com >.

[349] Dignitas, supra note 345 at "Brochure of DIGNITAS".

[350] *Ibid;* See e.g. *Carter* BCSC, *supra* note 91.

[351] See e.g. California Act, supra note 297.

A study into the non-commercially-based Dignitas has shown that it is an association located in Switzerland, whose mission is to provide assistance to undertake "a life and a death with dignity" to its world-wide subscribers, which offers; "[c]ounselling in regards to all end-of-life issues; [c]ooperation with physicians, clinics and other associations; […] [and] [a]ccompaniment of dying patients and assistance with a self-determined end of life".[352]

In North America, the aforementioned claims were evidenced in a Canadian court of law by a terminally-ill women, who had traveled to Switzerland to undertake a dignified death at Dignitas.[353] This Canadian woman represents the archetypal patient, who travels to Switzerland to seek assistance to suicide when a domestic law forbids the procedure.[354]

2. The Netherlands

Studies of the Netherlands' medical-assistance to dying regime has revealed that the jurisdiction no longer holds the practices of physician-assisted suicide and voluntary active euthanasia as criminally breaking the law for a "patient", who endures "lasting and unbearable suffering" that is incurable.[355]

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[352] Dignitas, supra note 345 at "Who is Dignitas" [words, non-capitalization & ellipsis added].

[353] See *Carter* BCSC, *supra* note 91 (Kathleen Carter had travelled to Switzerland to Dignitas to undertake assistance suicide at para 44).

[354] *Ibid.*

The law, which is referred to as the *Termination of Life on Request and Assisted Suicide (Review Procedures) Act*[356] also categorically includes persons who suffer from dementia, but that have provided for the request in advanced directives, coupled with the physician's belief that the patient is subject to "unbearable suffering with no prospect of improvement".[357]

It is interesting to note that an association called "Out of Free Will" had submitted a "citizen's initiative" entitled "Completed Life", which had propositioned an extension to medical-assistance to dying to include the elderly, more specifically "Dutch citizens over 70 years of age" that have grown "tired of life".[358] Despite the "Dutch Parliament" holding of a "plenary session" on the proposal, it appears that the law has remained intact.[359]

Recent innovations to the Netherlands assistance to dying regime have included a clinic, which specializes in "assisted suicide and euthanasia" that

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[355] The Dutch Act, supra note 342 at art 2(1)(b).

[356] *Ibid.*

[357] See Government of Netherlands, "Euthanasia, assisted suicide and non-resuscitation on request", online: < http://www.government.nl > [Gov NL].

[358] Wendy Zeldin, "Netherlands: Citizens Group Seeks New Right to Die", online: Library of Congress, < http://www.loc.gov >; "Plenary session about citizens initiative 'Completed Life' ", online: Tweede Kamer Der Staten-Generaal, < http://www.houseofrepresentatives.nl >.

[359] *Ibid;* The Dutch Act, supra note 342; Gov NL, supra note 357.

offers mobile units that allows assisted death to be undertaken in the privacy of an individuals home.[360]

It is paramount to take notice that the Dutch law has also extended the practice of assistance to dying for minors in the following circumstances: a consenting child between twelve years of age and sixteen years of age with consenting parents or guardian(s);[361] a consenting minor who is sixteen or seventeen years of age with the involvement of "the parent or the parents exercising parental authority and/or his guardian […] in the decision-making process", thus "parental consent" is not required;[362] and once the age of eighteen is reached "parental involvement" is not required[363].

Newborn infants may also be subject to the law, if the following "due care" requirements are met, for instance: an absolute certainty that the infant is enduring "unbearable suffering" with no chances of betterment; informed parental "consent" is mandatory, the doctor and mother/father believe that "there is no reasonable alternative"; and the necessity of an examination

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[360] Ben Brumfield, "Dutch euthanasia clinic offers mobile service", online: CNN, < http://www.cnn.com >.

[361] The Dutch Act, supra note 342 at art 2(4); Gov NL, supra note 357.

[362] *Ibid;* The Dutch Act, supra note 342 at art 2(3).

[363] Gov NL, supra note 357.

conducted by a second doctor, who renders a "written opinion on the compliance of the due care criteria listed" in the Dutch law.[364]

3. The Country of Belgium

The European jurisdiction of Belgium has decriminalized and legalized assistance to dying: procedures include both physician-assisted suicide and voluntary active euthanasia.[365]

It is essential to observe that on March 2, 2014, the country's dignified death regime has been extended to include no age restrictions for children; "Belgium's King Philippe signed into law an amendment to that country's euthanasia law that would open the medically assisted suicide option to children".[366] This medical end-of-life law is briefly summarized as follows:

> Under this new law, a child who is terminally ill,
> who suffers from intolerable and physical pain,

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[364] The Dutch Act, supra note 342 (see "Requirements of Due Care", which equally apply in the case of newborn infants at art 2(1)); Government of Netherlands, "Euthanasia and newborn infants", online: < http://www.government.nl >.

[365] Belgian Act, supra note 343.

[366] See Loi modifiant la loi du 28 mai 2002 relative à l'euthanasie, en vue d'étendre l'euthanasie aux mineurs (M.B. du 12.03.2014) [Belge loi mineurs]; Nicholas Boring, "Belgium: Removal of Age Restriction for Euthanasia", online: Library of Congress, < http://www.loc.gov >.

> whose capacity and judgment ("capacite de discernment") has been verified by a psychologist, and whose parents consent may request medically assisted suicide. (*La Beligique legalise l'euthanasie pour les mineurs*, supra.) Belgium thus has become the first nation to remove all formal age restrictions for euthanasia, although it is not the first to open that option to minors.[367]

4. The Grand Duchy of Luxembourg

Another European country that has officially recognized the practice of physician-assisted death is Luxembourg. The law permits the undertaking of euthanasia or physician-assisted suicide by an individual, who "suffers from an incurable condition and is constantly in unbearable physical or mental pain".[368]

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[367] *Ibid.*

[368] *Law of 16 March 2009 on Euthanasia and Assisted Suicide,* Memorial A-No. 46, 16 March 2009 [the Luxembourgish Act]; Nicole Atwill, "Luxembourg: Right to Die with Dignity" online: Library of Congress, < http://www.loc.gov >.

It remains essential that the doctor offers other "therapeutic" options, including "palliative care", prior to concluding, "that in the eyes of the patient, there is no other solution".[369]

5. The Republic of Columbia

Lastly, in Columbia the Constitutional Court had ruled in 1997 that a physician could not be convicted for providing euthanasia to a consenting patient, who had a "terminal illness".[370]

Nonetheless, mandatory implementation of said judgment had been postponed due to the pending approval of "the Columbian Congress" in regards to the "guidelines" of the procedure; such was finally assented on "April, 20, 2015".[371]

As a result, prior to 2015 a physician was able to refuse to undertake the end-of-life procedure, since 2015 a physician must perform the requested

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[369] *Ibid.*

[370] *Republic of Columbia Constitutional Court, Sentence # c-239 / 97, Ref. Expedient # D-1490, May 20, 1997* at 26-28 [*Columbia Const Crt*]; "Columbia", online: Patients Rights Council, < http://www.patientsrightcouncil.org > [Patients Rights Council].

[371] *Ibid.*

euthanasia procedure or at the very least refer the patient to an "institution" willing to perform the procedure.[372]

It is fitting for this essay to take notice that on pages 21 and 22 of the 1997 Columbian judgment, in a discourse that had held the unconstitutionality of *section 326 the Criminal Law*[373] because it had prohibited "mercy killing" that the Court had referred to the death of the Biblical figure, Job.[374] The relevant passages are as follows:[375]

> **Job is a pathetic example of the courage needed to live amidst painful and degrading circumstances but the resignation of the [S]aint justifiable and dignifying just because of his unshaken faith in God, cannot be the content of a judicial duty, because the State cannot demand from anybody heroic conducts,**

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[372] María Paula Suàrez Navas, "Columbian Public Doctors Must Now Provide Euthanasia By Law", online, PanAm*Post*: News and Analysis in the Americas, < http://www.panampost.com >; Patients Rights Counsel, supra note 371.

[373] *Columbia Const Crt, supra* note 371 at 2.

[374] *Ibid* at 21, 22.

[375] *Republic of Columbia Constitutional Court, Sentence # c-239 / 97, Ref. Expedient # D-1490, May 20, 1997* at 21, 22.

even less if their foundation is ascribed to a religious belief or to a moral attitude, which under a pluralist system can only have the nature of an option.

There is nothing more cruel than obliging a person to subsist amidst awful pain, on behalf of other's people's beliefs, even if a great majority of the population regards them as intangible. This is because the philosophy which informs the Constitution is based on its purpose of eradicating cruelty […].

In summary […] the absolute duty to live cannot be declared, for as Redbruch has said, in a Constitution which adopts that type of philosophy, the relations between moral and law are not on the same rank of the duties, but of the rights. In other words, he who lives a conduct as compulsory, in **function of his own religious or moral beliefs, cannot pretend that this be done cohesively extended to everybody**; only that he is

> allowed to live his moral life in plenty, and act
> in harmony with it without interference.[376]

The aforementioned excerpts that were presented by the Columbian Court had demonstrated that the immense pain that Job had suffered due to his failing health - pain that was tolerated by Job because of his faith in God - was an improper "religious or moral" justification to stop a terminally ill person from fully exercising his constitutionally protected right to die with dignity.[377]

Such has provided brief evidence that in courts of law religious repertoires have not remained uncommon in medical-assistance to dying judicial discourses.

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[376] *Ibid* at 21, 22 [capitalization, ellipses & emphasis added].

[377] *Ibid* at 21, 22.

Summary of Part One

In part one of this dissertation, I have attempted to separate the procedure known as physician-assisted suicide from other end-of-life medical practices. This separation was essential for in the subsequent parts of this essay, I will be referring to laws, jurisprudence and publications that most-oft make reference to the term physician-assisted suicide.

As such, part one of this dissertation has first discussed that physician-assisted death is divided into two categories: physician-assisted suicide and euthanasia. The primal distinction between these two medical procedures lies with an answer to a simple question: who administered the lethal dosage to cause death? If the answer is the patient, than the procedure is classified as physician-assisted suicide. By contrast, if the physician administers the lethal medication, it then qualifies as euthanasia. Predominately, contemporary terminology has replaced the terms physician-assisted suicide and euthanasia and employs words such as: medical-assistance to dying and dying with dignity, even though, such words were originally used as umbrella terms to include both end-of-life procedures.

Definitions regarding the various forms of euthanasia were than presented, with a warning that involuntary and non-voluntary euthanasia always remain

illegal in North America. However, voluntary active euthanasia is legal in Quebec and Canada, but is absolutely banned in the United States.

Exclusions to physician-assistance to suicide procedures where also presented: the right to refuse life-sustaining medical treatment and palliative care along with its hasten death theory. The similarities and differences between these exclusions and physician-assisted suicide where further demonstrated with notable Canadian and American case law.

Part one has also briefly reviewed the various national and international jurisdictions that have legalized physician-assisted suicide or/and euthanasia. The review has demonstrated that Canada and the Province of Quebec have legalized medical-assisted death. Whist, in the United States there exists no federal right to physician-assisted suicide procedures. Nonetheless, an increasing amount of individualized states have legalized or decriminalized the practice of physician-assisted suicide. Whist, internationally a study of several European jurisdictions has evidenced that amongst the countries that have legalized or decriminalized the end-of-life procedures, it remains that the majority of these jurisdictions are very liberal.

Finally, a concise examination of a Columbian case has pointed out that a religious discourse had been employed in a judicial constitutional discourse, which had debated the issue of euthanasia. This religious-based court dialogue

was demonstrated in order to gradually introduce claims that support the theory that religion has played imperative roles in assistance to dying courts of law.

Part Two – The Roles of Christianity in Physician-Assisted Suicide Courts of Law

Introductive Remark

I believe that it is beneficial to part two of this essay to first present brief passages from the works of leading authors, who have claimed that there has existed a strong link between issues that pertain to physician-assisted suicide and religion.

In a religious contribution designated as, "The role of religion in the debate about physician-assisted dying"[378], the author Dr. William Stempsey[379] has stated that in physician-assistance to death discourses "the role of religious belief […] is essential".[380] The author has claimed that religion-based ideologies have remained important when issues, which have engaged in death surfaced because it raised inquiries in regards to the significance of "life and death".[381] He has further addressed an important fact that for faith followers

[378] William E. Stempsey, "The role of religion in the debate about physician-assisted dying" (2010) 13:4 Med Health Care and Philos 383.

[379] Professor in the Philosophy department at the College of the Holy Cross. The college upholds a "Jesuit, Catholic identity", online: College of the Holy Cross, < http://www.holycross.edu >.

[380] Stempsey, supra note 378 at 383 [ellipsis added].

[381] Stempsey, supra note 378 at 383.

physician-assisted suicide issues even when formulated in none religious manners had still remained dogmatic in nature.[382] Suggesting that religion has been inescapable in the issue of physician assisted suicide because morality was being highly questioned.[383]

Doctor Stempsey has also discussed the scenario that if physician-assistance to dying were recognized as a right, individuals would be permitted to choose to undertake or forego the procedure.[384] However, the doctor has also emphasized that this choice would adhere to a person's "religious beliefs", which may condemned the practice of assistance to suicide and not on a choice based on non-religious morality.[385] A reasoning that was based on the premise that physician-assistance to suicide disputes have not merely focused on "individual liberty", but had also been subject to include "inherently religious matters" and "the religious element inherent in dying".[386]

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[382] *Ibid.*

[383] *Ibid* at 386.

[384] *Ibid.*

[385] *Ibid.*

[386] *Ibid.*

Whilst, Dr. Rubin has observed in an article entitled "Assisted Suicide, Morality and Law"[387] that if a law provided for the prohibition to physician-assisted suicide that it was actually guised as an imposition of religious righteousness on individuals, who consider undertaking the medical procedure.[388] The author has asserted that "current laws against assisted suicide are in fact efforts to take sides in an ongoing controversy and impose a religiously based morality on those who would otherwise choose an alternative approach."[389] His claim has been based on the ideology that bans to medically-assisted suicide laws had not taken into consideration secular morality, which has claimed that suicide had been a legitimate and intimate choice.[390] More preciously, Dr. Rubin believed that laws that ban physician-assisted suicide had been seen as advancing only a religious "traditional morality", while foregoing other perspectives.[391]

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[387] Edward Rubin, "Assisted Suicide, Morality, and Law: Why Prohibiting Assisted Suicide Violates the Establishment Clause" (2010) 63 Vand. L. Rev. 763 (WL).

[388] *Ibid* at 768.

[389] *Ibid* at 767.

[390] *Ibid* at 793.

[391] *Ibid.*

Most importantly for the purposes of this dissertation, in "Physician-Assisted Suicide Reconsidered: Dying as a Christian in a Post-Christian Age"[392], Professor Engelhart believed that discourses pertaining to the immoral conduct of physician-assisted suicide could not be separated from "Christianity".[393] The author strongly contended that it was impossible to fully understand the immorality of physician-assisted suicide "outside the experience of Christian life" for the "[t]raditional Christian appreciations of death involves an epistemology and metaphysics of values in discordance with those of secular morality".[394]

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[392] H. Tristram Engelhardt Jr, "Physician-Assisted Suicide Reconsidered: Dying as a Christian in a Post-Christian Age" (1998) 4:2 Christian Bioethics 143.

[393] *Ibid* at 143.

[394] *Ibid* [capitalization omitted].

Chapter 1 – Maintaining Physician-Assisted Suicide's Ban through Christian Religious Influences

A. The Canadian *Rodriguez* Era

Per previous discussions, in 1993 the Supreme Court of Canada in *Rodriguez v. British Columbia (A.G.)*[395] had ruled that section 241*(b)* of the *Criminal Code of Canada*[396] that prohibited physician-assisted suicide was constitutional.[397]

1. The Supreme Court Factum of the Interveners of the Canadian Conference of Catholic Bishops and The Evangelical Fellowship of Canada

a. Methodology

The *Rodriguez* Supreme Court had attracted the intervention of the Canadian Conference of Catholic Bishops[398] and the Evangelical Fellowship of Canada[399].

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[395] *Rodriguez, supra* note 36.

[396] *Criminal Code*, *supra* note 55 at 241*(b)*.

[397] *Rodriguez, supra* note 36.

[398] Hereinafter occasionally referred to as the CCCB.

[399] Hereinafter occasionally referred to as the EFC.

I have chosen to examine this *Rodriguez* Supreme Court factum, which is composed of the Canadian Conference of Catholic Bishops and the Evangelical Fellowship of Canada because it is a legal document that had provided the Supreme Court with pious arguments and Christian-inspired interpretations to maintain the legalization of the absolute ban to physician-assisted suicide.[400]

Fundamentally, these Christian groups had sought to convince the highest court of the land that the *Canadian Charter of Rights and Freedoms*[401] should be interpreted in light of a Christian God in order to ensure the constitutionality of section 241*(b)* of the *Criminal Code of Canada*.[402]

b. The Leave to Intervene

Subject to the aforementioned, in the Supreme Court *Rodriguez v. British Columbia (AG)*[403] case Justice Sopinka had "granted leave to intervene" to two

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[400] *Rodriguez v British Columbia (AG)*, [1993] 3 SCR 519, 107 DLR (4th) 342, 1993 (Factum of the Interveners Canadian Conference of Catholic Bishops and The Evangelical Fellowship of Canada) [Factum of CCCB & the EFC].

[401] *Charter, supra* note 148.

[402] Factum of CCCB & the EFC, supra note 401; *Criminal Code, supra* note 55 at s 241*(b)*.

[403] *Rodriguez, supra* note 36.

religious groups: the Canadian Conference of Catholic Bishops and the Evangelical Fellowship of Canada.[404]

In their capacity as Interveners, both groups had presented a joint factum.[405] The Canadian Conference of Catholic Bishops and the Evangelical Fellowship of Canada had taken issue with the constitutionality of section 241(b) of the *Criminal Code.*[406] The Interveners had advocated that the absolute prohibition to physician-assisted suicide provision conferred by the *Criminal Code* had not infringed Ms. Rodriguez' constitutional right to life, liberty and security as guaranteed by section 7 of the *Canadian Charter Rights and Freedoms.*[407]

c. The Canadian Conference of Catholic Bishops and the Evangelical Fellowship of Canada's Mission

Prior to addressing the religious-inspired submissions that were presented by the Interveners in support of the issue, it is worthy to first define what were the Canadian Conference of Catholic Bishops and The Evangelical Fellowship of

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[404] Factum of the CCCB & the EFC, supra note 400 at para 1.

[405] Factum of CCCB & the EFC, supra note 400.

[406] *Ibid* at para 4; *Criminal Code*, *supra* note 55 at s. 241*(b).*

[407] *Ibid*; Factum of CCCB & the EFC, supra note 400 at para 4; *Charter, supra* note 148 at s 7.

Canada's active contributions in public policies and in the courts of law - as was presented in the *Rodriguez* factum's "Statement of Facts".[408]

In order to achieve a better understanding of the EFC and the CCCB's mission to sustain Canada's PAS prohibition, it is also advantageous to briefly identify the theological sources and constituents of Christianity - with a focus into the EFC and CCCB's ascribed notions of Christian philosophy, morals, values and beliefs. And it is equally beneficial to provide examples that have transported these elements and ideologies into discourses pertaining to physician-assisted suicide and religion.

In the determination of the Interveners active contributions, the *Rodriguez* factum's "Statement of Facts" had shown that the Canadian Conference of Catholic Bishops had acknowledged that it was "active in bringing a moral, philosophical and spiritual perspective to a number of critical public policy issues".[409]

The "Statement of Facts" had also evidenced that the Evangelical Fellowship of Canada had stated that it acted as a representative for "twenty-eight Christian denominations", and that its intent was "to be a public advocate of its

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[408] Factum of CCCB & the EFC, supra note 400 at para 3.

[409] *Ibid.*

members' values and beliefs to government, courts and other public institutions and promote a life affirming ethic within Canadian culture".[410]

The combined objectives of the two Interveners fundamentally indicated to the Supreme Court that their role in the *Rodriguez*[411] case was to bring forth aspects of Christianity to ensure that the Court would consider their philosophy, spirituality, beliefs, morals and values in order to prevent the decriminalization of the absolute ban to physician-assisted suicide.[412]

A concise examination of the aforementioned influences has revealed the following: Christian philosophy has been generally viewed as a broad concept, but for the purpose of this essay it has been best described as being a "divine revelation" and a "biblical philosophy".[413]

Thus far, a bible-based philosophy, which has recognized that "[t]rue wisdom means seeing things from God's perceptive […]. It starts and ends with God. It

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[410] *Ibid.*

[411] *Rodriguez, supra* note 36.

[412] Factum of CCCB & the EFC, supra note 400 at para 3.

[413] See e.g. Pastor Curt Daniel Ph.d, "A Christian Philosophy" at 1, online: Faith Bible Church < http://www.faithbibleonline.net >.

is God-centered wisdom".[414] It has been referred as an epistemology that has encompassed Christian morality, values and beliefs, which have appeared to be intertwined with components of God's Law.[415] The primary source of the Divine's law has been derived from God,[416] and the word of God has been found in the Holy Bible and Sacred Scriptures.[417]

In accordance to the Evangelical Fellowship of Canada "[t]he Holy Scriptures, as originally given by God, are divinely inspired, infallible, entirely trustworthy, and constitute the only supreme authority in all matters of faith and conduct."[418]

In addition to having addressed a Christian philosophy the Interveners' mission had also advocated a Christian inspired morality. In the realm of physician-

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[414] *Ibid* at 2 [capitalization omitted & ellipsis added].

[415] See e.g. "What Evangelical Christians Believe", ("[l]aw. We believe God is the source of all moral and natural law" at para 3) online: Evangelical Beliefs. com: The unity of the Biblical Christian message, online: < http://www.evangelicalbeliefs.com > [Evangelical Beliefs].

[416] See *King James Bible* (Cambridge ed 1611) ("There is one lawgiver, who is able to save and to destroy: who art thou that judgest another?" at James 4:12) online: < http://www.kingjamesbibleonline.org > [KJV Bible]; Evangelical Beliefs, supra note 415 at "What Evangelical Christians Believe" at para 3, "Scriptural Support; "Daniel, supra note 413 at 5.

[417] See e.g KJV Bible, supra note 416; Evangelical Beliefs, supra note 415 ("Bible. We believe that the Bible is the Word of God; without error as originally written. It has been preserved by Him, and is the final authority in all matters of doctrine and faith-above all human authority" at "What Evangelical Christians Believe"); Daniel, supra note 413 at 5.

[418] EFC: The Evangelical Fellowship of Canada, "Statement of Faith", online: < http://www.evangelicalfellowship.ca > [Evangelical Fellowship].

assisted suicide the traditional Christian moral perception to justify maintaining an absolute ban to medial-assistance to suicide has been that the act was contrary to God's Law and his Providence.[419] The majority of Christian followers believed that suicide was a mortal sin, whilst physician-assistance to dying was not only an immoral act, but was equally considered to break one of the Ten Commandments; "thou shall not kill".[420] More precisely a religious ban to physician-assisted suicide had been justified because according to the Holy Scriptures it had constituted as murder.[421]

The Evangelical Fellowship of Canada had supported the absolute ban to physician-assistance to dying by having acknowledged "that euthanasia and assisted suicide both involve[d] acts of murder/homicide and [were] not compassionate alternatives to end-of-life care".[422] In essence, the conventional Christian perspective has been that suicide was "a moral wrong" and to have aided one in assisted suicide was a punishable act.[423]

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[419] See e.g. "Religious Groups' Views on End-of-Life Issues", online: Pew Research Center: *Religion & Public Life* < http://www.pewforum.org >.

[420] KJV Bible, supra note 416 at Exodus 20:13; Engelhardt, supra note 393 at 149, 152.

[421] "Quebec's Bill 52: Euphemisms for Euthanasia" at 18, online: The Evangelical Fellowship of Canada Center for Faith and Public Life, < http://www.files.efc-canada.net >.

[422] *Ibid* at 4 [words & letter added].

[423] Rubin, supra note 387 at 793.

One of Canada's Christian Magazines, *Faith Today*, has published an article entitled, "We don't seek to impose our morality: Christians seek the best for our lands".[424] The author Bruce J. Clemenger, who is also "president of the Evangelical Fellowship of Canada", had discussed his recognition that "faith groups", which have advocated prohibitions to physician-assistance to dying have been oft-blamed for imposing their religious morals.[425]

According to Mr. Clemenger, this was an erred assumption, for the Evangelical Fellowship of Canada had not been imposing their morality by advocating the prohibitions to the medical procedures.[426] His reasoning was based on the premise that because "[a]ssisted suicide and euthanasia are not private acts", the EFC [has held] a "responsibility, to participate in the shaping of the consensus".[427] Mr. Clemenger saw the EFC's support for the medical bans not as an implementation of religious convictions, but as the result of advocating "life" and concerns for the "vulnerable" segments of society.[428]

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[424] Bruce J. Clemenger, "We don't seek to impose our morality: Christians seek the best for our land", Faith Today (March/April 2016) at 14 online:< http://www.digital.faithtoday.ca >; Evangelical Fellowship, supra note 418 at "Bruce J. Clemenger".

[425] Clemenger, supra note 424 at 14.

[426] *Ibid.*

[427] *Ibid* [capitalization omitted & words added].

[428] *Ibid.*

It is possible to argue that Mr. Clemenger's claim was flawed. For instance, the Evangelical Fellowship of Canada and the Canadian Conference of Catholic Bishops had asserted in the *Rodriguez* factum that Ms. Rodriguez' appeal had involved "much more than a personal and private decision of one individual".[429] Contrary to Mr. Clemenger argument that the EFC was not advocating Christian beliefs to support an absolute ban to physician-assistance to suicide because of the public nature of physician-assisted suicide, the EFC and the CCCB had quoted the Catholic Health Association of the United States and a pertinent article, "Care of the Dying: A Catholic Perspective".[430] A passage of that paper had stated that, "[w]e are also social by nature since we are made in the **image of God** – A community of loving persons […]. To treat euthanasia and assisted suicide solely as private acts of personal freedom is a mistake, because they are actually social actions that involve at least one other person."[431] The excerpt had revealed that in the *Rodriguez* factum the Interveners had supported the claim that physician-assisted suicide was a public act through a religious tenant, which was equally employed in their attempt to maintain the PAS ban.[432]

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[429] Factum CCCB & the EFC, supra note 400 at 14 para 30).

[430] Catholic Health Association of the United States, "Care of the Dying: A Catholic Perspective", Health Progress (March 1993) 34 at 37 cited in Factum CCCB & the EFC, supra note 400 at para 30.

[431] *Ibid* [emphasis & ellipsis added].

[432] *Ibid.*

A secondary exemplar has also revealed that the Evangelical Fellowship of Canada's President's statement was inadequate. According to a McGill Law Review publication entitled, "The Public and Private Deaths of Sue Rodriguez"[433], author Eugene Bereza, had demonstrated that Ms. Rodriguez' death had not only been private, but had equally become a public issue.[434]

Ms. Bereza, had taken notice that in Ms. Rodriguez' public battle to legalize physician-assisted suicide, she not only had to fight the "government", but also had to equally endure the presence and influence of the "Council of Catholic Bishops" – and additional groups - and their aim to implement their moral ideologies regarding physician-assisted suicide.[435] A Christian group that was most likely considered as being "a special interest group", and that was "confident in their knowledge of the truth concerning the morality of assisted group often eager to share, and occasionally impose their views on others".[436]

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[433] Eugene Bereza, "The Private and Publics Deaths of Sue Rodriguez", (1994) 39 McGill LJ 719.

[434] *Ibid* at 719.

[435] *Ibid* at 721.

[436] *Ibid* (the author of the article had added that an "interest group" usually was "[t]he most vocal, the most organized, the best financed and the most manipulative"; essential elements in order to be successful in the implementation of their perspective, which was the "only morally and legally acceptable one" at 721, 722).

To further uphold her contention that the death had become of public interest, she had noted that theological "opinions" – amongst others - were carefully examined by the Supreme Court judges in the decision-making process of the physician-assistance to dying debate;[437] "legal judgments" rendered from court justices were founded upon "their experiences" and that such experiences included a justice's subjective religious ideologies.[438]

Thus, by demonstrating that a link was established between the importance for Christians to observe God's law through Christian philosophy, morality and beliefs and to employ "biblical interpretations to contemporary issues",[439] and by revealing that this religious mission was reflected in the submissions of the *Rodriguez* factum deposited by the CCCB and the EFC this will provide evidence that in the *Rodriguez* factum the pious Interveners' role to persuade the Supreme Court to maintain the prohibition to physician-assisted suicide and to uphold the constitutionality of section 241(b) of the *Criminal Code*[440] was through Christian religious influences.[441]

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[437] *Ibid* at 720.

[438] *Ibid* at 722.

[439] Evangelical Fellowship, supra note 418 at "Mission and Vision".

[440] *Criminal Code*, *supra* note 55 at s. 241*(b)*.

[441] Factum CCCB & the EFC, supra note 400.

d. The Pious Submissions

i. Interpreting s. 7 of *The Charter* Through the Preamble of the *Charter*: The Supremacy of God Clause

An examination of the Supreme Court *Rodriguez* factum that was presented by the Canadian Conference of Catholic Bishops and the Evangelical Fellowship of Canada has indicated that in their attempt to maintain the status quo of the law's ban to physician-assisted suicide, the CCCB and the EFC were concerned with the constitutionality of section 241(b) of the *Criminal Code*.[442] The Interveners had sought to ensure that the disposition would have not created a violation on section 7 of the *Charter*[443], and in the event that it had, that the infringement would have been justified once subject to the limitation clause of section 1 of the *Charter*.[444]

To support their argument the CCCB and the EFC had evoked that s. 7 of the *Charter* had to be interpreted in accordance to the preamble of the *Constitution Act, 1982*[445], which states: "Whereas Canada is founded upon principles that

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[442] *Ibid* at para 4(i); *Criminal Code*, *supra* note 55 at s. 241*(b)*.

[443] *Charter, supra* note 148 at s 7.

[444] *Ibid* at s 1; Factum CCCB & the EFC, supra note 400 at para 4(i)(ii)).

recognize the **supremacy of God** and the rule of law".[446] A rationalization that had indicated to the Supreme Court that the *Canadian Charter of Rights and Freedoms* had to be read and interpreted not only in light of the rule of law, but equally in accordance to the supremacy of God.[447]

To advance their claim the Interveners had cited the *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*[448] Supreme Court case.[449] In that decision, Justice Cory had spoken on behalf of the Court and was inclined to have affirmed that "the entrenchment of the rule of law into the Preamble of the Charter is a recognition of the fact it is a "cornerstone of our democratic form of government".[450] The CCCB and the EFC - and not the Court in the *Canadian Council of Churches v. Canada (Minister of*

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[445] *Charter, supra* note 148.

[446] *Ibid* [emphasis added]; Factum CCCB & the EFC, supra note 400 at paras 9, 10.

[447] *Ibid* at paras 11, 12.

[448] [1992] 1 SCR 236, [1992] SCJ No 5 [*Canadian Council of Churches*].

This decision had challenged the *Immigration Act, 1976* and its recent amendments pertaining to the Convention Refugee. They were seeking a judicial declaration, which would have declared the unconstitutionality of the amendments. The issue was whether the Canadian Council of Churches had standing. The court determined that the Council did not have standing. This case is notable for the determination of the required criteria for the standing of public-interest groups.

[449] *Canadian Council of Churches, supra* note 448 at 250 cited in Factum of CCCB & the EFC, supra note 400.

[450] *Ibid* at para 11.

Employment and Immigration) Supreme Court case – had enjoined the Justice's remark by stipulating that "[t]he same must necessarily hold true for the supremacy of God".[451]

The Canadian Conference of Catholic Bishops and the Evangelical Fellowship of Canada had further insisted that:

> The founding principles that recognize the "supremacy of God" and "the rule of law" are rooted in Canada's philosophical and theological traditions which are the foundation of Canada's fundamental values. Like the rule of law, **the supremacy of God is a fundamental aspect of the Charter and should be expressly recognized and applied by the courts in interpreting and shaping the fundamental rights and freedoms guaranteed by the Charter**.[452]

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[451] CCCB & the EFC, supra note 400 at para 11 (capitalization omitted).

[452] *Ibid* at para 12 [emphasis added].

A study has indicated that there has appeared to be two prominent schools of thought regarding the effect that should have been attributed to the *Charter*[453] preamble supremacy of God clause. The first claim was supported by a faith-based ideology, which had suggested that the *Charter* supremacy of God clause should be entitled to the same treatment as the rule of law clause. Whilst, the second category had been advanced by leading constitutional law experts, who had acknowledged that the preamble of the *Charter*[454] and its reference to the supremacy of God, was without effect. An examination of these dichotomies has been essential in determining whether the Interveners in the *Rodriguez*[455] case had attempted to maintain the prohibition to physician-assisted suicide through religious influences.

In the exploration of the first school of thought the insertion of the clause was an amendment to the Preamble of the *Charter of Rights and Freedoms*.[456] According to an article entitled, "Trudeau, God, and the Canadian Constitution: Religion, Human Rights, and Governmental Authority in the Making of the

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[453] *Charter, supra* note 148.

[454] *Ibid.*

[455] *Rodriguez, supra* note 36.

[456] "God and Canada's Charter of Rights", Canadian Secular Alliance, online:< http://www.secularalliance.ca > [CSA].

1982 Constitution"[457], Professor George Egerton, had written that originally "the constitutional proposals for an entrenched [C]harter generated by Trudeau and his advisors contained no religious or divine referent […]". [458] Fundamentally, the amendment was the result of pious agendas.[459]

Throughout the era of the constitutional "partition debate", religious-based organizations - especially the Evangelical Fellowship of Canada - had been actively participating in issues that were of a concern to their members.[460] They were advocating a "conservative socially agenda", such as being, opposed to "abortion and sexual orientation".[461]

In order to ensure that their preoccupations would be respected in the legislative and judicial arenas "**[t]he Evangelical Fellowship of Canada petitioned Prime Minister Trudeau to include a reference to God in the**

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[457] George Egerton, "Trudeau, God, and the Canadian Constitution: Religion, Human Rights, and Governmental Authority in the Making of the 1982 Constitution", published in David Lyon and Maguerite Van Die, eds. *Rethinking Church, State, and Modernity: Canada Between Europe and America* (Toronto: University of Toronto Press, 2000) at chp 5 *cited in* CSA, supra note 456.

[458] *Ibid* [capitalization & ellipsis added].

[459] CSA, supra note 456.

[460] John Helis, "God and the Constitution: the Significance of the Supremacy of God in the Preamble of the Charter of Rights and Freedom" (2011) Carleton University, Ottawa, Ontario at 13.

[461] *Ibid.*

Charter, arguing that 'the acknowledgement of one Supreme God to whom we as a nation are answerable gives ground for legislation bearing on all matters human."[462] Thus, religious influences were paramount and pious groups remained "anxious to see an explicit reference to the supremacy of God stipulated in a preamble to the draft *Charter*".[463]

More recently, the Christian Heritage Party of Canada[464] a "pro-life federal Christian Political Party" has strongly endorsed "the Judeo-Christian principles enshrined in the Canadian Constitution: Canada was founded upon principles that recognize the supremacy of God' – capital 'G': the God of the Bible – and the rule of law."[465] The CHP has encouraged their members to bring forth "Biblical perspectives" in the "public square" because such has been denied in "parliamentary debates" and in the "courts".[466]

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[462] George Egerton, supra note 457 cited in CSA, supra note 456 [capitalization omitted & emphasis added].

[463] Helis, supra note 460 at 13.

[464] Hereinafter occasionally referred to as the CHP Canada.

[465] "About CHP Canada", online: Christian Heritage Party of Canada < http://www.chp.ca/about >.

[466] *Ibid.*

The National Leader of the CHP of Canada, Rod Taylor in a Press Release, known as the "CHP Canada Challenges Parliament to End the Abuse of Power by the Courts" was of the opinion that the Supreme Court of Canada had been exercising abusive "judicial activism", which has created "arbitrary" and unsafe laws.[467] Thus, speaking on behalf of the "Christian Political Party", Taylor has stated that such laws have consisted in the Supreme Court of Canada's recent legalization of physician-assistance to dying.[468]

One of Taylor's claims for formulating his critic was founded on the reasoning that the courts had not abided to the *Charter's* preamble of the notion of the supremacy of God.[469] According to Taylor, the function of the supremacy of God clause in the preamble of *Charter*[470]:

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[467] Christian Heritage Party of Canada, Press Release, "CHP Canada Challenges Parliament to End the Abuse of Power by the Courts", (22 June 2016) online: Christian Heritage Party of Canada, < http://www.chp.ca > [CHP Press Release].

[468] *Ibid* ([t]he author had further believed that the Supreme Court partook in "judicial activism" because in the *Carter* case the court had declared the absolute ban to physician-assisted suicide unconstitutional and gave Parliament one year to provide new legislation that would allow for the procedure, the decision had caused both the House of Commons and the Senate to spend a long time debating the issue. According to Taylor, "[i]n the end, Parliamentarians concluded they had 'no choice' but to accommodate the Supreme Court ruling. On its face, that irresponsible surrender to the Court on a matter of life and death is unconscionable." at example 4); *Carter* SCC, *supra* note 147.

[469] CHP Press Release, supra note 467; *Charter, supra* note 148.

[470] *Ibid*; CHP Press Release, supra note 467.

> [A]ssures us that the natural laws of morality, decency, common sense and justice, **laws which reflect the heart of our Creator** and are the foundation of our heritage, will prevail over inadequate human notions, subject to the fragilities of misguided zeal and personal interest.[471]

Thus, Taylor had employed a reasoning that reflected the faithfulness of the religious beliefs of the Christian Heritage Party.[472] A reasoning that has not been uncommon for Taylor, for in an earlier publication entitled, "Canada's Christian Heritage"[473], which had explored Canada's historical Christian "legal heritage", Taylor had noted that the *Charter's* "Rights and Freedoms" were to be read taking into account the following religious "truths":[474]

> That God, the Creator of mankind and all that makes up our world, alone has the right to order the affairs of mankind and to direct our

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[471] *Ibid* [capitalization & emphasis added].

[472] Ron Taylor, "Canada's Christian Heritage", online: Christian Heritage Party of Canada, < http://www.chp.ca >.

[473] *Ibid.*

[474] *Ibid; Charter, supra* note 148.

> steps. He is overall; His precepts are non-negotiable and His judgments are right. That the **laws of Canada must conform to His law** and that all Canadians must be equally subject to those laws.[475]

Despite the *Charter's* constitutional protection of freedom of conscience and religion[476], which has recognized the right to believe or not to believe in God, the Christian Heritage Party has believed that Christianity, as a religion, was and continues to be the dominant "influence" in Canada.[477] As a result Canadian laws should have and must reveal "the influence of Biblical teachings".[478]

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[475] Ron Taylor, supra note 472 (emphasis added).

[476] *Ibid; Charter, supra* note 148 at s 2(a).

[477] Hogg, infra note 483; Ron Taylor, supra note 472.

[478] *Ibid.*

In further support of the claim, Taylor presented various "portions of Holy Scriptures" that have been found on the "walls" of "Parliamentary buildings", which have served to recall the Christian heritage of "Canadian law and convention". Such Scriptures have included:

> He shall have dominion also from sea to sea. Psalm 72:8
> Give the king thy judgments, O God, and thy righteousness unto the king's son. Psalm 72:1
> Where there is no vision, the people perish. Proverbs 29:18
> Glory to God in the highest, and on earth peace, good will to men. Luke 2:14

It is safe to assume that the brief aforementioned presentations had provided some form of explanation for the EFC and the CCCB to have submitted the argument that insisted that the *Charter's* preamble's supremacy of God clause should be employed to interpret the constitutional disposition, more specifically section 7 of the *Charter*[479] - in order to ensure that the ban to legalized physician-assisted suicide would have been sustained.[480] Thus, Constitutional tenants and laws that according to the Evangelical Fellowship of Canada and the Christian Heritage Party of Canada have been constructed upon the Christian faith.

By contrast, the second school of though has demised the effect of the *Charter*[481] supremacy of God clause. To determine if legal specialists and the majority of the courts of law had actually applied the principle of the

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> Take unto you the whole armor of God, that ye may be able to withstand in the evil day, and having done all, to stand. Ephesians 6:13
> If I ascend up into heaven, thou art there; if I lay down in the bowels of the earth, thou art there!
> If I take the wings of the morning and dwell in the uttermost parts of the sea, even there shall thy hand lead me and thy right shall hold me. Psalm 139: 8-10
> Love justice, you that are the rulers of the earth. Wisdom of Solomon 1:1 (Apocrypha)
> Fear God, Honour the king. 1 Peter 2:17".

[479] *Charter, supra* note 148 at s 7.

[480] *Ibid;* Factum of CCCB & the EFC, supra note 400.

[481] *Charter, supra* note 148.

supremacy of God to the interpretation of the *Charter* dispositions, an examination has demonstrated that the answer was negative.

For instance, in the *Canada Act 1982 Annotated*[482], Peter Hogg leading constitutional law expert and scholar, and renowned author had noted that "the supremacy of God" in the *Charter's* preamble has not offered any form of assistance.[483]

Furthermore, in a report that was conducted by Emeritus Constitutional Law Professor Jose Woehrling, from the Faculté de droit de l'Université de Montréal, and Professor Rosalie Jukier, from the Faculty of Law of McGill University, which was entitled "Religion and the Secular State in Canada"[484] had revealed that the Preamble of the *Charter of Rights and Freedoms*[485] and its possible religious effects on the interpretation of the articles of the *Charter*

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[482] Peter Hogg, *Canada Act 1982 Annotated,* (Toronto Canada: Carswell, 1982).

[483] *Ibid* (according to Hogg, referring to "God" was also of no support in interpreting section 2(a) of the *Charter* – "freedom of religion and conscience"*,* the reasoning behind Hogg's claim was that s. 2(a) of the *Charter*, which guarantees the constitutional protection of "conscience", included an individual's right not to believe in "God", and to be atheist or agnostic at 9).

[484] Rosalie Jukier and Jose Woehrling, "Religion and the Secular State in Canada", in Javier Martinez-Torron & W. Cole Durham, Jr., (General Reporters), Donlu D. Thayer, ed., *Religion and the Secular State,* (Madrid: servicio publicaciones facultad derecho Universidad Complutense Madrid, 2015) 155-191.

[485] *Charter, supra* note 148.

had not been clearly evidenced.[486] The authors had noted that "while the Preamble of the *Charter* contains a reference to the 'supremacy of God', this had not yet been given any significant meaning by the courts".[487]

As an exemplar, in the British Colombia Court of Appeal decision, *R. v. Sharp*[488], the "supremacy of God" was perceived as being a "dead letter".[489] In the opposing position, dissenting Judge Belzil of the Alberta Court of Appeal was of the opinion in the *Big M Drug Mart*[490] case that the *Charter* preamble reference of the "supremacy of God" was a clear indication that Canada had a Christian-based history.[491] As for the *Rodriguez*[492] Supreme Court case, there

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[486] Jukier & Woehrling, supra note 484 at 160.

[487] *Ibid.*

[488] BCCA 416, [1999] B.C.J. No 1555 at paras 78-80, per Southin J.A. cited in Lorne Sossin, "The 'Supremacy of God', Human Dignity and the *Charter of Rights and Freedoms*" (2003) 52:277 UNBLJ 227 at 232.

[489] *Ibid.*

[490] *Her Majesty the Queen in Right of Canada v Big M Drug Mart Ltd* [1985] 1 SRC 295,1985 CarswellAtla 316 [*Big M Drug*].

[491] *Ibid* at paras 30-31 cited in Sossin, supra note 488 at 233.

In the *Big M Drug Mart* Supreme Court case Justice Dickson had noted that:

> Mr. Justice Belzil said it was realistic to recognize that the Canadian nation is part of "Western" or "European" civilization, moulded in and impressed with Christian values and traditions, and that these remain a strong constituent element in the basic fabric of our society. The

was no mention of the supremacy of God clause, but dissenting Justice Lamer had mentioned that "the right to choose" physician-assisted suicide brought forth "theological considerations" due to its moral nature, which the Court had to cast aside because only a "legal perspective" on the issue was acceptable.[493]

ii. Life Affirming Principles: The Sanctity of life and God's Property Rights

In their role to maintain the absolute ban to physician-assisted suicide per s. 241*(b)* of the *Criminal Code*[494], the Canadian Conference of Catholic Bishops and the Evangelical Fellowship of Canada had not limited their pious

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> judge quoted a passage from The Oxford Companion to Law (1980) expatiating on the extent of the influence of Christianity on our legal and social systems and then appears the *cri du coeur* central to the judgment at pp. 663-64:
>
> I do not believe that the political sponsors of the Charter intended to confer upon the courts the task of stripping away all vestiges of those values and traditions, and the courts should be most loath to assume that role. With the Lord's Day Act eliminated, will not all reference in the statutes to Christmas, Easter, or Thanksgiving be next? What of the use of the Gregorian Calendar? Such interpretation would make of the Charter an instrument for the repression of the majority at the instance of every dissident and result in an amorphous, rootless and godless nation contrary to the recognition of the Supremacy of God declared in the preamble. The "living tree" will wither if planted in sterilized soil.

[492] *Rodriguez*, *supra* note 36.

[493] *Ibid*.

[494] *Criminal Code*, *supra* note 55 at s. 241*(b)*.

submissions strictly to the supremacy of God clause as found in the preamble of the *Charter*.[495] The Interveners had also employed Christian teachings and theological doctrines in the *Rodriguez* factum to justify the meaning of "life affirming principles", which they believed had incorporated themselves in both the "civil and criminal law" systems.[496]

According to the CCCB and the EFC "life affirming principles" had bestowed the message "**that human beings, created in the image of God**, [had] inherent worth and dignity. Human life, therefore, [was to] be valued, respected and protected throughout all its stages. **We are but stewards of what God has entrusted to us**".[497]

The CCCB and the EFC had also referenced the Law Reform Commission[498] and its working paper, "Euthanasia, Aiding Suicide and Cession of Treatment"[499] in order to acknowledge that "life-affirming principles" extended to include the sanctity of life and the role of religion by stating that:

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[495] Factum of CCCB & the EFC, supra note 400; *Criminal Code*, *supra* note 55 at s. 241*(b)*; *Charter, supra* note 148.

[496] Factum of CCCB & the EFC, supra note 400 at para 14.

[497] *Ibid* at para 13 [words deleted, words added, & emphasis added].

[498] Hereinafter occasionally referred to the LRC.

> [L]aw faithfully reflects one of society's traditional attitudes. Our society recognizes that morally, religiously, philosophically, human life merits special protection. This recognition of life' fundamental importance has often been expressed by the concept of the sanctity of human life. […].[500]

Research has demonstrated that it has not been uncommon for religious opponents to the legalization of physician-assisted suicide to refer to the sanctity of life in the traditional paradigm of Holy Scriptures and pious creeds. For instance, in its Christian Biblical meaning, the sanctity of life has been defined in the following manner:

> The Christian's belief in the sanctity of life is derived from the doctrine of God as Creator. God has made man in his image with power to reason and choose. Each individual is precious to him and made for eternal destiny. Thus the

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[499] Law Reform Commission, "Euthanasia, Aiding Suicide and Cession of Treatment" Working Paper No. 28 (1982) at 3 [LRC] *cited in* Factum of CCCB & the EFC, supra note 400 at para 14.

[500] *Ibid* [capitalization & ellipsis added].

> Christian Attitude toward human life can only be one of reverence enjoined by the whole of the Decalogue (not only by the Sixth Commandment) and confirmed by the incarnation – which is extended to every individual from the moment of his conception to extreme old age.[501]

Whilst, in an article entitled, "A Theological Response to Physician-Assisted Suicide",[502] the author has enforced the Christian definition of the sanctity of life by stating that:

> Christians believe that God is the Creator of heaven and earth and all the universe. All of creation is good because it has its source in

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[501] John Macquarrie ed. *Dictionary of Christian Ethics*, (Philadelphia, Pennsylvania: Westminster Press, 1967) *sub verbo* Thomas Wood, "Life, sacredness of" at 195, 196, cited in Trevor J. Major, "Life: Sanctity or Quality?" 3: 4 Journal of Biblical Ethics in Medicine 19 at 19.

[502] Lauris C Kaldjian, "A Theological Response to Physician-Assisted Suicide" (1999) 56:2 Theology Today Princeton 197, online: U.S. National Library of Medicine National Institutes of Health, < http://www.ncbi.nlm.nih.gov >.

Dr. Kaldjian is a physician, professor of internal medicine, Director of the Bioethics and Humanities Program at the University of Iowa Carver College of Medicine, and Chair for the Committee on Law and Ethics of the Iowa Medical Society. He holds interests in research that has focused in several medically-related arenas, which has included "end of life decision making" and "philosophical and religious beliefs in clinical decision-making". See Lauris C. Kaldjian, MD, PhD, online: University of Iowa Health Care: Carver College of Medicine, Department of Internal Medicine < http://www.medicine.uiowa.edu >.

> the goodness of God. Human life is a part of God's image. Therefore human life is sacred. The sanctity of life is also revealed by the incarnation of Jesus Christ, which distinguishes human being as the particular place where God has chosen to reveal eternal love and election. The belief that human life is a fundamental good is reflected in the command not to kill.[503]

It was paramount to note that a derivation from the theological belief of the sanctity of life had brought forth a religious-based right to property[504] ideology. This concept was worthy to examine because in the *Rodriguez* factum, the EFC and the CCCB, when justifying what had constituted as "life affirming principles" and "the sanctity of life" had referred to the Law Reform Commission papers and the claim that " one expression of this concept [the sanctity of life] is that because **life is God given and we merely hold in trust**, we should not then interfere with it or put an end to it."[505]

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[503] Kaldjian, supra note 502 at 198.

[504] There is no right to property in the *Canadian Charter of Rights and Freedoms*. See *Charter, supra* note 148.

The term, "hold in trust", has often been employed in the domains of trusts regarding property. In accordance to Black's Law Dictionary[506] property has been explained as the "ownership; the unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude every one else from using it […]."[507]

An academic doctrine, known as *The Law of Trusts*[508] has described a "trust" as "a device for dealing with property"[509] where the settlor "transfers property [in trust] with instructions that the property is to be used for the benefit of [the settlor or the beneficiary]."[510]

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[505] LRC, supra note 499 at 3 cited in Factum of CCCB & the EFC, supra note 400 at para 14 [words & emphasis added].

[506] *Black's*, supra note 3, *sub verbo* "Property".

[507] *Ibid* cited *in* Roger F. Friedman, "It's My Body and I'll Die If I Want To: A Property-Based Argument in Support of Assisted Suicide" (1995) 12:1 J Contemp Health L & Pol'y 183 at 198 [ellipsis added].

[508] Mark R. Gillen & Faye Woodman, *The Law of Trusts; A Contextual Approach* (Toronto Ontario: Edmond Montgomery Publications Ltd, 2000).

[509] *Ibid* at 3.

[510] *Ibid* at 4 [words omitted and added].

By contrast, a "gift" has required that an "intention to make a gift" has existed, that "a transfer of the property" has occurred, and that "the gift has been accepted".[511]

By analogically applying these legal concepts pertaining to property, trusts and gifts to the domain of suicide and its assistance in the context of a religious-based right to property, one may further comprehend the following reasoning. Philosopher Immanuel Kant had addressed suicide as unacceptable behavior, basing his philosophy on the sanctity of life and "the purposes of the Creator"; a pious construction.[512] He believed that "**[God] is our proprietor; [and] we His property**", and to terminate one's existence is contrary to the instructions given by God.[513]

Whilst, in an article that Dr. Kaldjian wrote, "A Theological Response to Physician-Assisted Suicide"[514], which had focused on physician-assistance to suicide via the "gospel of Jesus Christ", Kaldjian had interpreted life as being a

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[511] *Ibid* at 55.

[512] Immanuel Kant, *Lectures on Ethics* translated by Louis Inflied (1963) cited in Perlmutter, supra note 16 at 206.

[513] *Ibid* at 206 [words & emphasis added].

[514] Kaldjian, supra note 502.

God-given present, which was subject to termination only per God's decision.[515] The phrasing of his ideology was addressed in this manner:

> The goodness of our lives does not depend on our desire to live but on the belief that **life comes to us from a God as a gift**. We have, accordingly, an obligation to God to live, gratefully accepting the gift of life with God being its only limit. **Only God can make an end to human life** since God alone is its author […] Life underneath God's providence never ceases to be a good because human life is God's good gift sustained by God's good will. This gift is also God's to take back, so there are occasions when God commands that we be willing to lose our lives as a result of remaining faithful. But such occasions, whether due to disease or persecution, should not be described as situations in which we choose death.[516]

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[515] *Ibid* at 198.

[516] *Ibid* at 198, 199, 203. [emphasis & ellipsis added].

Furthermore, in one of Margaret Battin's publications, *Physician Assisted Suicide: Expanding the Debate*[517], a section of her book referred to as "Catholic Views"[518] had denoted that a Catholic-based view of a Christian's existence held that "[l]ife is seen not as 'self-creation' but as a **gift from the Creator**, a gift over which we are to exercise stewardship, not dominion".[519]

Whilst, the concept of "stewardship" in the realms of medical-assistance to dying according to University of Notre Dame's Law Professor Cathleen Kaveny has meant that "we do not have total control over our lives. Life is not ours to dispose of when we choose. It is not our property which we can trade, sell, or destroy at will. In better words, '[b]y aiming at our deaths we usurp God's proper providence in allotting the span of our lives'."[520]

Perhaps these genres of religious arguments have further inspired opponents to physician-assistance to suicide to crusade for prohibited-assistance to dying regimes by interchanging the notion of God's proprietorship with that of the States. Thus, replacing God, and granting the State with proprietor rights over

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[517] Margaret Battin, Rosamond Rhodes & Anita Silvers, *Physician Assisted Suicide: Expanding the Debate*, (New York: Routledge, 1998).

[518] *Ibid* at 326.

[519] *Ibid* at 326 [emphasis added].

[520] *Ibid* at 326.

its citizens in end-of-life matters.[521]. It remains a controversial thought, but perhaps this theory was presented in the *Rodriguez*[522] case when Justice Sopinka had noted that the "Sanctity of life" had always excluded the "freedom of choice in the self-infliction of death and certainly in the involvement of others to carry out that choice."[523] And that the state had no societal opposition in regulating its "power" and interaction with persons wishing to end their lives.[524]

In concluding this segment, it is paramount to take notice that despite the blatant religious submissions made by the Evangelical Fellowship of Canada and the Canadian Council of Bishops in the *Rodriguez* factum, Justice Sopinka in the *Rodriguez*[525] case had acknowledged that s. 241*(b)* of the *Criminal Code*[526] did not include legalized physician-assisted suicide because the

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[521] It has been suggested that under the *Fifth and Fourteenth Amendments of the U. S. Constitution* "no person can be deprived of *any* of the rights that attach to the ownership of property without due process of law, including the right to transfer and the right to consume or destroy". In accordance to this argument the "body is property", and when "a person wishes to destroy his property by committing suicide, or wishes to transfer the right to destroy his or her property by seeking assistance in committing suicide then that person cannot be deprived of such property rights without due process of the law." *Contra* Friedman, supra note 507 at 205.

[522] *Rodriguez, supra* note 36.

[523] *Ibid* at para 15.

[524] *Ibid.*

[525] *Ibid.*

[526] *Criminal Code, supra* note 55 at 241*(b)*.

constitutional protection conferred by s. 7 of the *Charter*[527] and its right to the security of the person "is intrinsically concerned with the well-being of the living person".[528] A discourse, which was a "deeply rooted belief in our society that human life is scared and inviolable […]".[529]

Sopinka had assured the court that his reasoning was not based on pious teachings and doctrines, but on the ideology that had been employed by Dr. Ronald Dworkin - "that human life is seen to have deep intrinsic value of its own".[530] A life affirming principle that had not recognize the religious submissions presented by the Evangelical Fellowship of Canada and the Canadian Council of Bishops in the *Rodriguez* factum.[531]

Paradoxically, further research has demonstrated that Dr. Dworkin was a supporter of physician-assisted suicide, and had acted as an *Amicus Curia* in

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[527] *Charter, supra* note 148 at s 7.

[528] *Ibid; Rodriguez, supra* note 36 at para 14.

[529] *Ibid* [ellipsis added].

[530] Ronald Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia and Individual Freedom,* (New York: Alfred A. Knopf, Inc., 1993) cited in *Rodriguez, supra note* 36 para 14.

[531] *Contra*, Factum of CCCB & the EFC, supra note 400.

the American Supreme Court *Washington v. Glucksberg*[532] and *Vacco v. Quill*[533] physician-assistance to suicide cases.[534]

B. The Religious Objective of s. 241(b) of the *Criminal Code*

The Evangelical Fellowship of Canada and the Canadian Catholic Council of Bishops had also presented submissions that promoted the ideal that for a "community" the legalization of PAS would have demised its confidence in providing individuals with the protection of "life" and its task to safe keep.[535] Permissible PAS would have equally brought forth "undue pressure" upon the "elderly or infirm" to seek out a "physician to kill them" in order to avoid becoming "a burden on others.[536]

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[532] *Glucksberg*, *supra* note 114.

[533] *Quill*, *supra* note 114.

[534] *Washington v Glucksberg v Quill* (Brief for Ronald Dworkin, Thomas Nagel, Robert Nozick, et al. in support of respondents) 1996 WL 708956 (US) (Appellant brief) Supreme Court of the United States [Dworkin brief]; *Glucksberg*, *supra* note 114; *Quill*, *supra* note 114.

[535] Factum of CCCB & the EFC, supra note 400 at para 31.

[536] *Ibid* at para 33.

To reinforce this discourse, the Interveners had cited the work of Reverend Michel Place, "Why We Should not Legalize Euthanasia"[537] quoting that "[o]ur living together in community requires a basic trust that human life and dignity will be respected. Euthanasia and assisted suicide erode this trust and undermine the community's commitment to life and responsibility to care and comfort."[538]

The EFC and the CCCB had also referred to "Thomas G. Dailey, ThD, Director of St. Joseph's College Catholic Bioethics Centre in Edmonton", and his paper entitled "Choosing Death: Exploring Assisted Suicide".[539] The Interveners cited Dailey's statements that the legalization of PAS would convey the message that "[y]ou're not important; you're not needed: in fact you are a burden to others. Such a law would indeed effect a slippery slope".[540]

One may suggest that the aforementioned arguments were an analogy to the protection of the vulnerable members of society; an argument that had oft-been employed in courts of law to uphold bans to physician-assisted suicide. Similar

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[537] Reverend Michael Place, "Why We Should not Legalize Euthanasia" (March 1993) Health Progress 39 at 42 cited in Factum of CCCB & the EFC, supra note 400 at para 31.

[538] *Ibid* [capitalization omitted].

[539] Thomas G. Dailey ThD, "Choosing Death: Exploring Assisted Suicide" (1992) Our Family 12 at 13, 14 cited in Factum of CCCB & the EFC, supra note 400 at paras 20, 33.

[540] *Ibid* at para 33 [capitalization omitted].

to the EFC and the CCCB's interest with legalized PAS and its effects in the community, in the *Rodriguez*[541] case both the majority and minority justices were concerned with the protection of the vulnerable segments of society and the potential abuses linked to the legalization of PAS.[542]

On behalf of the majority of the *Rodriguez* Court, Justice Sopinka had asserted that the "government's objective" in prohibiting physician-assisted suicide was the protection of the "vulnerable".[543] Dreading that the legalization of physician-assisted suicide would lead to abuses of such members of societies.[544] He had reasoned that the prohibition to the medical procedure was found to be "the norm among Western democracies", and that the Law Reform Commission was concerned with the "criminal law", which "sanctions the principles of the sanctity of human life".[545] Fundamentally, the Justice was concerned that by allowing the practice of physician-assisted suicide it could very well create "the slippery slope" phenomena.[546]

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[541] *Rodriguez, supra* note 36.

[542] *Ibid.*

[543] *Ibid* at para 25 (the preservation of life was also an objective), para 34.

[544] *Ibid* at para 47.

[545] *Ibid* at para 34, 52.

[546] *Ibid* at para 50.

Despite the EFC and CCCB's concern for a communal "commitment to life and responsibility to care and comfort"[547] the objective of section 241*(b)* of the *Criminal Code*[548] to protect society's vulnerable individuals, and Justice Sopinka's reasoning to uphold the PAS law, several months after the Supreme Court's decision, Ms. Rodriguez privately died with the aid of an undisclosed doctor.[549]

Thus, it has been suggested that perhaps the real objective of section 241*(b)* of the *Criminal Code*[550] was not the protection of the vulnerable - who might be induced in moments of weakness to commit suicide if physician-assisted suicide was legalized.[551]

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[547] Factum of CCCB & the EFC, supra note 400 at para 31.

[548] *Criminal Code*, *supra* note 55 at s 241(b).

[549] Bereza, supra note 433 at 719.

[550] *Criminal Code*, *supra* note 55.

[551] Derek Jugnauth, "Rodrigues Reloaded: A Pious Path to Assisted-Suicide" (2011) 30 Windsor Rev Legal & Soc Issues 215.

It remains important to note that arguments refusing to legalize PAS based on the law's objective to protect the vulnerable have not been completely successful in reality. In the prevention of the application of the slippery slope doctrine, national and international contemporary nationhoods have later demonstrated that vulnerable segments of the population have not been further protected with absolute blanket prohibitions to the procedure. Some of society's most vulnerable individuals have actually included those seeking assistance to dying, but who were left without legalized assistance to dying medical recourses to assist in their end-of-life wishes. As a result these individuals have had to either: prescribe to palliative care,

which has been proven not to be one hundred percent effective in pain relieve nor accessible to everyone; resort to the right to refuse life-sustaining medical treatments or nutrition / hydration that can result in a long and painful death; endure the physical pain and physiological distress associated with the natural progression of the illness; find relieve in a jurisdiction where physician-assisted death is legal and has not established residency requirements in order to be eligible for the procedure – which has been evidenced to be financially costly; commit premature self-death while still able; undertake multiple suicide attempts along with unimaginable consequences upon failure of the attempts; or seek illegal measures of assisted death and risk that the abiding doctor be prosecuted or/and that the medical procedure is unsuccessful.

Also, in the Province of Quebec, a member of society's vulnerable segments – a handicapped male - had proven that the former federally-based lack of physician-assisted suicide, and its attempt to protect the "vulnerable" has been unsuccessful. Paradoxically, Quebec's present legislation on permissible medical-assistance to dying – *An Act Respecting End-of-Life Care* - has also been unable to assist and safeguard the community's same vulnerable population due to its categorical exclusion to access the procedure. These defeats, had led a handicapped patient suffering from excruciating pain to be subject to a long and horrid death.

In 2010, Pierre Mayence, became paralyzed from the neck down due to a parachute accident that caused a rupture in his neck. Three weeks after his accident he was back to work managing his company, but with the use of a mouth-controlled computer and a telephone adapted to his post-accidental needs. Shortly afterwards, his medical situation was deteriorating, and he was suffering from intense pain and severe bedsores, which rendered his mobility excessively limited and caused him to be reliant on medical personnel and friends. Knowing that he was not able to obtain "medical aid to die" in the Province of Quebec, Mayence decided to commit suicide by refusing life-sustaining nutrition. Prior to his fast, he sought a safeguard order from the Superior Court of Quebec to ensure that medical personnel would not force him to eat in the event that he would enter into a state of unconsciousness. Additionally, he had asked the court to make certain that the medical center would alleviate his pain and suffering with appropriate medication. Justice Francois Rolland gave cause to the plaintiff by concluding that Mayence held the capacity to refuse all medical treatment, which included life-sustaining nutrition. After the judgment the plaintiff partook in a suicide-fast that lasted for sixty-one days his only intake was water along with a morphine drip for his pain and suffering; he pasted away on September 16th, 2014. It was evidenced that his death was everything, but "dignified".

Notwithstanding the fact that at the time, the lack of a federal physician-assisted death regime could not provide assistance for Mayence his medical situation also did not classify as a terminal illness at its final stage, thus equally excluding him from the application of Quebec's recently adopted legislation, *An Act Respecting End of life Care*. As a result, this native from Belgium - where both physician-assisted suicide and euthanasia are legal - had stated that that if he had known that he would be excluded from the application of Quebec's dignified death law, he would have flown to Belgium to have undergone the procedure.

Upon failure to obtain a dignified death in one's domicile or place of residence, Pierre Mayence is not the only person who would have flown, or has flown overseas to engage in European assistance to dying, which is also referred to as "Suicide Tourism".

For instance, Susan Griffiths was a seventy-two year old woman from the Province of Winnipeg suffering from Multiple System Atrophy. Unable to choose Canadian physician-assistance to dying as an option to terminate her life she flew to Dignitas in Switzerland to undertake accompanied suicide. Prior to her death she made a public statement that resonated with the concern that law had to satisfy society's evolving needs, which stemmed as follows:

In an award winning paper entitled, "Rodriguez Reloaded: A Pious Path to Assisted Suicide"[552] the author of the article had purposed a hypothetical claim that 241*(b)* of the *Criminal Code*[553] and its purpose was not the protection of the vulnerable segments of society, but had contained an underlying Christian-inspired "religious purpose".[554]

> I sincerely hope that Canadian laws will change soon to allow individuals like myself to make end-of-life choices at home. I am not afraid and anticipate a peaceful, dignified and gentle death […] I only wish it could take place in Canada.

Even though Pierre Mayence was handicapped, and Susan Griffiths suffered from a terminal illness each wished to end their lives in a dignified manner, respectively on Quebec and Canadian soil. The former was unsuccessful in achieving a peaceful death, whilst the latter prevailed, nonetheless, both situations evidenced that Canada's former absolute prohibition to physician-assisted suicide law and Quebec's medical aid to dying law were ineffective in protecting various vulnerable groups.

Gratefully, the Supreme Court of Canada has finally recognized that physician-assistance to dying will be available to patients suffering from "a grievous and irremediable medical condition - including an illness, disease or disability - that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition". In hopes that vulnerable segments of the society will be offered better protection with the legalization of Canadian physician-assistance to dying

See *Centre de santé et de services sociaux Pierre-Boucher et Pierre Mayence c Michel Van Landschoot et Procureur General du Quebec* 2014 QCCS 4248, 2014 CarswellQue 9123*;* Philippe Teisceira-Lessard, "Un suicide par jeune autorise", *La Presse* (8 October 2014) online: La Presse, < http://www.lapresse.ca >; Steve Lambert, "Canadian dies with the aid of doctor in Switzerland, but wished it could have been in Canada", *National Post* (April 25, 2013) online: National Post < http://www.nationalpost.com > [ellipsis added].

[552] Jugnauth, supra note 551.

[553] *Criminal Code*, *supra* note 55 at s 241*(b)*.

[554] *Ibid;* Jugnauth, supra note 551 at 215.

Presented as a fictitious scenario, the author had portrayed himself as a justice who had been part of the *Rodriguez*[555] Supreme Court.[556] He had questioned if the outcome of the *Rodriguez*[557] case would have been different if the *Rodriguez* Court would have examined the possibility that a "religious purpose underlie[d] section 241(b) of the *Criminal Code*"[558] by asserting that:

> At its core, this case is about whether the government, by virtue of the operation of section 241(b), has denied Sue Rodriguez the right to decide on the time, place and circumstances of her death, contrary to the *Canadian Charter of Rights and Freedoms* ('Charter"). The outcome should not turn on any particular view of morality […] for or against assisted suicide [...] **section 241(b) of the *Criminal Code* has at its root a sectarian purpose that promotes the religious observance of Christian ideals**. I find the

[555] *Rodriguez, supra* note 36.

[556] *Ibid;* Jugnauth, supra note 551.

[557] *Rodriguez, supra* note 36.

[558] Jugnauth, supra note 551 at 215.

> religious doctrine underpinning the law against assisted suicide to constitute an illegitimate purpose that offends section 2(a) of the *Charter* and cannot be saved by section 1 […].[559]

An examination of the "scope of freedom of religion" of section 2(a) of the *Charter*[560] has revealed that all individuals are free to follow and practice a religious faith of one's choice, which has also included one's preference not to observe any religion.[561] The protection conferred by the *Charter*[562] has also indicated that one was "protected from state-imposed religious oppression", which has included mandatory participation to "religious dogma" that one did not believe in and that unjustifiably restrained one's "free will".[563] In accordance to this explanation, no individual should have been prevented in assisting Ms. Rodriguez in her suicide presumably on the grounds that the practice would have been offensive to the religion-based orientations held by various individuals.[564]

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[559] *Ibid* at 218 paras 3, 4 [emphasis & ellipses added].

[560] *Charter, supra* note 148 at s 2(a).

[561] *Ibid;* Jugnauth, supra note 551 at paras 33, 34.

[562] *Charter, supra* note 148 at 2(a).

[563] *Ibid;* Jugnauth, supra note 551 at para 34.

[564] *Ibid.*

Thus, it remained plausible that the issue in the *Rodriguez*[565] case revolved around the inquiry that questioned whether the absolute ban to physician-assisted suicide per section 241 (b) of the *Criminal Code*[566] "serve[d] a religious end" because an individual that would have been willing to have aided Ms. Rodriguez to undertake an assistance to suicide might have endured an obstacle in exercising her / his own "free will".[567]

To substantiate this reasoning, Jugnauth's paper had introduced an analogy between a possible "issue" in the Supreme Court *Rodriguez*[568] decision and the Supreme Court case *R v. Big M Drug Mart Ltd*.[569] The latter case was an earlier landmark decision that was a pioneer in interpreting and rendering a judgment in regards to section 2(a) of the *Charter*[570] – the right to freedom of conscience and religion.[571]

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[565] *Rodriguez, supra* note 36.

[566] *Criminal Code*, *supra* note 55 at s. 241*(b)*.

[567] *Ibid;* Jugnauth, supra note 551 at para 35.

[568] *Rodriguez, supra* note 36.

[569] *Ibid; Big M Drug*, *supra* note 490 cited in Jugnauth, supra note 551 at para 35 at 36.

[570] *Canadian Charter, supra* note 148 at s 2(a).

[571] *Ibid; Big M Drug, supra* note 490.

At issue "was whether the purpose of the law itself was an affront to religious freedom".[572] The Supreme Court had struck down the *Lord's Day Act* because it had violated section 2(a) of the *Charter*.[573] The purpose of the *Lord's Day Act* was found to be "the compulsion of religious observance", which had "bind[ed] all to a sectarian Christian ideal".[574]

Thus, similar to the *Big M Drug Mart*[575] case, in the *Rodriguez*[576] decision "the purpose of section 241(b) offend[ed] the very principles of freedom within the context of section 2(a) [of the *Charter*]".[577]

In order to demonstrate the religious "intended purpose" of section 241*(b)* of the *Criminal Code*[578] Jugnauth had first observed that historically Christianity had swayed the act of "suicide", especially throughout "the period of

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[572] *Big M Drug*, *supra* note 490 cited in Jugnauth, supra note 551 at para 35 at 36.

[573] *Canadian Charter, supra* note 148 at s 2(a); *Big M Drug, supra* note 491.

[574] *Ibid*.

[575] *Big M Drug, supra* note 490.

[576] *Rodriguez, supra* note 36.

[577] *Ibid;* Jugnauth, supra note 551 at para 37 [words & letters added].

[578] *Criminal Code*, *supra* note 55 at s 241*(b)*.

'enlightenment' in England.[579] This "geopolitical focus" was needed in order to explain the "reception of English common law into Canada throughout the 18th and 19th centuries".[580]

Thus, "the English perspective, heavily dominated by early Christian influence, [was] the most instructive in terms of ascertaining the intended purpose of Canada's [former] criminal offence pertaining to assisted suicide".[581] Jugnauth had justified this claim by stating that:

> There is little doubt as to the **presence of a religious undertow in the origin of the common law prohibitions against suicide and assisted-suicide**. The rule against killing had its genesis in the belief that **life was a gift from God** to His subjects, who were to be stewards of that life but never the owner. Thus, it was a **sin against God to defile property through suicide**. This conviction was deeply entrenched in Christian doctrine by the **Sixth**

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[579] *Ibid;* Jugnauth, supra note 551 at para 38.

[580] *Ibid.*

[581] *Ibid* at para 38 [words added].

Commandment. "Thou shall not kill".[582]

In accordance to the aforementioned excerpt the attempt to demonstrate that the basis to Canada's absolute ban to physician-assisted suicide laws had lied within the "origins of the common law prohibitions against suicide and assisted suicide", which had included taken notice of the paramount contribution made by Christianity's belief of the Commandment, "Thou shalt not kill", and the role that it had occupied in the realm of impermissible suicide and physician-assisted suicide laws.[583] Thus, an explanation that was similar in essence to that employed by the Evangelical Fellowship of Canada and the Canadian Conference of Catholic Bishops of Canada in their *Rodriguez* Factum, but to maintain the prohibition to physician-assisted suicide.[584]

It was professed in the "Rodriguez Reloaded: A pious Path to Assisted Suicide"[585] article that the extension to include the notion of suicide in the Sixth Commandment was brought forth by St. Augustine – "one of the most influential figures to advance western Christianity".[586]

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[582] *Ibid* at para 39 [emphasis added].

[583] *Ibid* at para 39, 40; KJV Bible, supra note 416 *sub verbo* Exodus 20:13.

[584] Factum of CCCB & the EFC, supra note 400.

[585] Jugnauth, supra note 551.

[586] *Ibid* at para 39.

In *The City of God*[587], St. Augustine believed that the prohibition to "suicide" was encompassed in the "Sixth Commandment".[588] A reasoning that was supported by the vagueness of the "language" of the "Sixth Commandment" when compared to the other Commandments, which "were more specific in their application".[589] Thus, St. Augustine was convinced that the Sixth Commandment included a suicide ban,[590] which he had noted in *The City of God*[591] was "a cowardly way of escaping pain and suffering in this life".[592]

Jugnauth's excerpt had also revealed that the foundation of the Common Law ban against assistance to suicide rested on the Christian premise "that one's life is the property of God".[593] A claim, which was similarly used by the Evangelical Fellowship of Canada and the Conference of Catholic Bishops of

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[587] Saint Augustine, *The City of God*, translated by Marcus Dods (New York: Random House Inc., 1950) [*City of* God] cited in Jugnauth, supra note 551 at para 39.

[588] *Ibid*; Battin, super note 517 at 335.

[589] *City of God*, supra note 587 cited in Jugnauth, supra note 551 at para 39.

[590] *Ibid.*

[591] *City of God*, *supra* note 587.

[592] *Ibid* cited in Battin, supra note 517 at 335.

[593] Jugnauth, supra note 551 at para 41.

Canada in the *Rodriguez* factum; a profess that was employed to sustain the absolute ban to physician-assisted physician.[594]

As previously discussed, this Christian ideology had been employed in physician-assisted suicide's rhetoric in order to demonstrate that committing one's own self-destruction was a "moral sin" that was subject to God's punishment.[595] One may also quote, 1 *Corinthians 3:17*, "If anyone destroys God's temple, God will destroy him; for God's temple is sacred, and you are that temple", to provide justification to support this argument.[596]

Thus, Jugnauth had referred to the "property of God" doctrine to informatively assist in the claim that the purpose of section 241*(b)* of the *Criminal Code*[597] had lied within religious Christian origins.[598]

The history of the church and its treatment of "suicide victims" had also provided evidence that the origins of the prohibition to the Common law PAS

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[594] Factum of CCCB & the EFC, supra note 400 at para 14.

[595] Jugnauth, supra note 551 at para 41.

[596] *Ibid* at para 40.

[597] *Criminal Code*, *supra* note 55 at s. 241*(b)*.

[598] Jugnauth, supra note 551 at paras 39, 41.

bans were Christian bound.[599] As exemplars, "[i]n AD 533 the Council of Orleans officially denied funeral rites to anyone that had killed themselves; and in 693 the Council of Toledo announced excommunication for attempted suicide".[600] These religious traditions had been observed for hundreds of years, for instance:

> In England […] the bodies of persons who had committed suicide were desecrated. Suicide victims were denied burial on holy grounds […]. In the early 19th century Britain, the family of a suicide victim was required to dispose of the deceased at night and forgo all religious ceremony.[601]

Thus, "until 1823" early "English law" had dictated that "the body of the suicide [had to] be placed at the "crossroads of two highways" and "with a stake driven through" the body.[602]

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[599] *Ibid* at para 42.

[600] David C Thomasma & Thomadine Kusher, eds, *Birth to Death: Science and Bioethics*, (Cambridge, UK: Cambridge University Press, 1996) at 208 cited in Jugnauth, supra note 551 at para 42; *Rodriguez, supra* note 36.

[601] Jugnauth, supra note 551 at para 43 [ellipses added].

[602] *Ibid*; *Rodriguez, supra* note 36 at para 38 [words added].

In the *Rodriguez*[603] case, Justice Sopinka had equally undertaken a historical repertoire of the suicide dispositions pertaining to the *Criminal Code of Canada*[604], and had also recognized the "religious structure".[605]

Thus, both Justice Sopinka and Jugnauth had conducted a review of the historical aspects of suicide in accordance to the Common Law and the Canadian *Criminal Code*, and the impermissibility that had lied within religious origins.[606] The review had acknowledged that "[a]t common law, suicide was seen as a form of felonious homicide that offended both God and the King's interest in the life of his citizens".[607]

In support of this claim, both Justice Sopinka and Jugnauth had referenced "Blackstone [who had] noted in *Commentaries on the Laws of England* (1769), vol. 4, at p.189 […] [that] **the law of England wisely and religiously considers**, **that no man hath a power to destroy life, but by commission of God**, the author of it: [...] the law has therefore ranked this among the highest

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[603] *Ibid.*

[604] *Criminal Code, supra* note 55.

[605] *Ibid*; Jugnauth, supra note 551 at para 45; *Rodriguez, supra* note at para 36 at 36 et s.

[606] *Ibid*; Jugnauth, supra note 551 at para 45.

[607] *Ibid*; *Rodriguez, supra* note 36 at 36 [capitalization omitted].

crimes, making it a peculiar species of felony, a felony committed on oneself".[608]

However, Sopinka had added that due to the complications associated with the prosecutions of a "successful suicide" the ban revolved around "attempted suicide".[609] Thus, "it was considered an offense and accessory liability for assisted suicide was made punishable".[610] Justice Sopinka had further noted that "[i]n England, this took the form of a charge of accessory before the fact to murder or murder itself until the passage of the *Suicide Act, 1961* (U.K.), 9 &10 Eliz. 2, c. 60, which created an offence of assisting suicide which reads much like ours. 241".[611]

Contrary to Justice Sopinka, the fictional justice Jugnauth was of the opinion that the aforementioned pious historical repertoire of the prohibitions to suicide and assistance to suicide had lead to the determination that a Christian ban to physician-assisted suicide was still present at "the time English common law was received into Canada"[612] he had held that:

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[608] *Ibid* ; Jugnauth, supra note 551 at para 45 [emphasis & ellipses added].

[609] *Rodriguez, supra* note 36 at 39.

[610] *Ibid.*

[611] *Ibid* [capitalization omitted].

[612] Jugnauth, supra note 551 at paras 44, 46, 47.

The British common law enshrined religious tenets in the prohibition against suicide and assisted-suicide. This common law was then received into Upper and Lower Canada, and the other provinces as those lands were progressively colonized. The Canadian common law, then closely aligned with and highly representative of its English predecessor, was codified into the first Canadian *Criminal Code*, passed in 1892, which contained the offence of assisted-suicide in section 237 (55-56 Vict, c 29, s 237). Sopinka J acknowledge[d], at para 39 of his reasons, that the current section 241(b) offence is substantially the same prohibitions as what was originally contained in section 237. It is clear to me that there is an **unbroken chain between religious dogma underpinning the historical Christian prohibition on suicide and assisted-suicide, and section 241(b) of the current *Criminal Code.*** Therefore, **I find the true purpose of section 241(b) is to promote religious observance of the Christian ideal of**

fidelity to God and His will with respect to life and death.[613]

Thus, a religious purpose was found to underline the PAS ban.[614] A claim that was antithetical to the objective of section 241*(b)* of the *Criminal Code*[615], and to the Evangelical Fellowship of Canada and the Canadian Conference of Catholic Bishops *Rodriguez* factum submission that the prohibition to physician-assisted suicide served to ensure the well-being of the community's members and to eliminate a potential slippery slope.[616]

Jugnauth's reasoning to reject the well-established purpose of section 241(b) of the *Criminal Code*[617]*,* "the protection of the vulnerable members of society who might be influenced by others in decisions that bring about their suicide"[618] was based on his findings that it did not take into account the aforementioned "historical foundation of an offense that was imported more

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[613] *Ibid* at para 46, 47 [emphasis added]

[614] Jugnauth, supra note 552.

[615] *Criminal Code*, *supra* note 55 s 241*(b)*.

[616] Factum of CCCB & the EFC, supra note 400; *Criminal Code*, *supra* note 55 at s 241*(b)*; See also *Rodriguez, supra* note 36.

[617] *Criminal Code*, *supra* note 55 s 241*(b)*.

[618] Jugnauth, supra note 551 at para 48.

than a hundred years ago in to the Canadian criminal jurisprudence".[619] This pious foundation had caused section 241(b) of the *Criminal Code*, to create a criminal sanction for the individual who desired to assist Ms. Rodriguez with her suicide; a criminal sanction, which "force[d] upon that person a Christian ideal with the respect to the sanctity of life and fidelity to a Christian God".[620] Under this law, "these individuals [were] compelled by the state toward inaction with no room for the operation of their free will in respect of their own religious beliefs".[621] Under this reasoning, "the government has used the criminal law to impose a sectarian doctrine".[622]

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[619] *Ibid.*

[620] *Ibid* at para 52.

[621] *Ibid* at [words deleted and added].

[622] *Ibid* at 52.

C. The *Carter* Supreme Court

1. The Supreme Court Factum of the Intervener of the Evangelical Fellowship of Canada

a. Initial Observation and Methodology

As mentioned, the *Carter v. Canada (Attorney General)*[623] Supreme Court had declared Canada's ban to physician-assisted suicide unconstitutional.[624] However, not without the resistant of several Christian organizations that once again had included the Evangelical Fellowship of Canada.[625]

I have sought to present this particular *Carter* Supreme Court Evangelical Fellowship of Canada factum[626] in order to demonstrate that the majority of the EFC's submission had seemed to succumb to a form of secular evolution – since their Supreme Court *Rodriguez* factum[627] - in the sense that the

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[623] *Carter* SCC*, supra* note at 147.

[624] *Ibid.*

[625] *Carter v Canada (Attorney General),* 2015 SCC 5, [2015] 1 SCR 331 (Factum of Intervener, the Evangelical Fellowship of Canada) [Factum of the EFC].
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[626] *Ibid.*

[627] Factum of CCCB & the EFC, supra note 400.

arguments no longer had addressed apparent Christian discourses that had attempted to impose theological-based interpretations of the *Canadian Charter*.[628] Nonetheless, in the *Carter* factum it remained that discreet attempts were made by the EFC to introduce religious morality in the decision-making process to maintain the prohibition to physician-assisted suicide.[629]

b. The Submissions

i. A Non-Dogmatic Sanctity of Life

Thus far, the Evangelical Fellowship of Canada's factum arguments to prevent the legalization of physician-assisted suicide were submitted twice to the Supreme Court of Canada.[630]

In both the *Rodriguez*[631] case and in the *Carter*[632] decision the Supreme Court

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[628] *Ibid;* Factum of the EFC, supra note 625; *Charter, supra* note 148.

[629] Factum of the EFC, supra note 625.

[630] *Ibid;* Factum of CCCB & the EFC, supra note 400; *Rodriguez, supra* note 36; *Carter SCC, supra* note 147.

[631] *Rodriguez, supra* note 36.

[632] *Carter SCC, supra* note 147.

had granted permission to the EFC to act as an Intervener.[633]

It has been documented in this thesis that in maintaining an absolute ban to physician-assistance to suicide several submissions in the Evangelical Fellowship of Canada's Supreme Court *Rodriguez* factum had been presented to the Court using an overtly Christian repertoire.[634] Such included the Supremacy of God Clause of the preamble of the *Charter*[635], and life affirming principles that had emphasized a Christian-based sanctity of life doctrine.[636] By contrast, in the Supreme Court *Carter* factum the EFC's arguments were contended using a limited religious repertoire.[637] At first glance, the factum has appeared to contain non-biblical interpretations and barely any pious discourses.[638] For instance in paragraph 12 of the factum the sanctity of life argument was for the most part presented to the Supreme Court as a "*Charter*

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[633] *Ibid; Rodriguez, supra* note 36; Factum of CCCB & the EFC, supra note 400; Factum of the EFC, supra note 625.

[634] Factum of CCCB & the EFC, supra note 400.

[635] *Charter, supra* note 148.

[636] *Ibid;* Factum of CCCB & the EFC, supra note 400.

[637] Factum of the EFC, supra note 625.

[638] *Ibid.*

Value" and not through the Bible's moral laden values and Christian theological doctrines.[639]

It is paramount to observe that prior to the EFC's Supreme Court *Carter* factum submission,[640] court rulings that had supported both the prohibition and the legalization of physician-assistance to suicide had demonstrated the importance that the doctrine of the sanctity of life be interpreted not as a pious value.[641] To corroborate this finding the EFC in the *Carter* factum at paragraph 8 had referenced Justice Sopinka's words in the *Rodriguez* case that: [642]

> the **sanctity** of life … is one of the three *Charter* values protected by s. 7. … **human life is scared or inviolable** (which terms I use in the non-religious sense described by Dworkin … to mean that human life is seen to have a **deep intrinsic value of its own**). [emphasis added]"[643]

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[639] *Ibid* at para 12.

[640] Factum of the EFC, supra note 625.

[641] See e.g. *Rodriguez, supra* note 36; See e.g. *Carter* BCSC, *supra* note 91.

[642] Factum of the EFC, supra note 625 at para 8; *Rodriguez, supra* note 36 at para 14.

[643] *Ibid.*

Whilst, it was not acknowledged by the EFC, that Justice Lynn Smith in the trial court *Carter*[644] decision had also reasoned that "[t]he sanctity of life is a principle that is not absolute in our society […] while it is central to the value system of a number of religions, that does not settle its place in a secular state."[645]

Thus, to support the EFC Supreme Court *Carter* factum arguments, which were composed of submissions that asserted that "*Charter* Values" included the "sanctity of life" and provided "a sound Constitutional basis for the impugned provisions";[646] the ban to "all consensual killings" was "a valid Parliamentary objective",[647] and section 7 of the *Charter*[648] "[did] not include a right to be killed".[649] The EFC had attempted to employ a new strategy in their role to maintain the prohibition to physician-assisted suicide.[650] A strategy that had consisted in the Evangelical Fellowship advocating a "non-religious"

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[644] *Carter* BCSC, *supra* note 91.

[645] *Ibid* at para 315(a) [capitalization omitted & ellipsis added].

[646] Factum of the EFC, supra note 625 at para 6.

[647] *Ibid.*

[648] *Charter, supra* note 148 at s 7.

[649] *Ibid;* Factum of the EFC, supra note 625 at para 6 [word added].

[650] Factum of the EFC, supra note 625.

definition of the sanctity of life, and the tenet that the sanctity of life "is an animating *Charter* Value".[651] The EFC had ensured that for court purposes the sanctity of life was not to be interpreted solely as a theological construction[652] by noting that:

> The *Charter* Value of the sanctity of human life is embraced by, among many others, the 40 denominations and 100 church-related organizations which constitute the EFC. **While the 'deeper reason' for the EFC's embrace of these principles originates in sacred texts and theology, the EFC does not come to Court to assert the legal authority of the biblical text**.[653]

Paradoxically, the aforementioned passage was not addressed before the Evangelical Fellowship of Canada had reminded the *Carter*[654] Supreme Court that the Law Reform Commission of Canada in its working paper no. 28,

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[651] *Ibid* at paras 2, 8.

[652] *Ibid.*

[653] Factum of the EFC, supra note 625 at para 12 [emphasis added].

[654] *Carter* SCC, *supra* note at 147.

"euthanasia, aiding suicide and cessation of treatment"[655] had concluded that "human life is *sui generis*", and that the "sanctity of life" is a ***"sacred trust"*** because "**life is God given and we merely hold in it trust**".[656]

A submission that was similarly found in the *Rodriguez* factum in terms of its religious context, but that differed from the past due to the fact that it was the sole overtly religious submission in the *Carter* factum.[657]

ii. The Secular State

In furthering the Evangelical Fellowship of Canada's role to not "assert the legal authority of the biblical text" in the judicial physician-assisted suicide prohibition debate, the EFC had informed the *Carter*[658] Court that "[it came] to contribute to this Court's articulation of an overlapping social consensus and non-sectarian political ethic."[659]

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[655] Law Reform Commission, "euthanasia, aiding suicide and cessation of treatment", working paper no 28, 1982 at 3-4, EFC BoA tab 11 and JR Vol 43 at 12087-88 cited in Factum of the EFC, supra note 625 at para 10.

[656] *Ibid* [emphasis added].

[657] Factum of CCCB & the EFC, supra note 400; Factum of the EFC, supra note 625.

[658] *Carter* SCC, *supra* note 147.

[659] Factum of the EFC, supra note 625 at para 12 [words added].

Thus, in accordance to the phrasing of the EFC's words, it would appear that the EFC had aimed to assure the Court that it supported the notion of a secular state.[660] However, a detailed observation of the *Carter* factum has revealed that perhaps the attempt had been a guised imposition to implement religious morality into the concept of secularism.[661]

In support of the EFC's position, the EFC had referred to "Canadian philosopher, Charles Taylor".[662] Prior to introducing the use of Taylor's work in the EFC's factum,[663] it is beneficially to acknowledge this author and the importance of his contributions. Dr. Taylor is a Professor Emeritus at McGill University and has been addressed as "[o]ne of the most important thinkers Canada had produced".[664]

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[660] *Ibid;* Although the EFC had not referred to the word "secular" in their factum, at footnote 9, the EFC had referred to the *Chamberlain v. Surrey School District No. 36* Supreme Court decision. A case that is well-versed in the notion of secularism; *Chamberlain v. Surrey School District No. 36* [2002] 4 S.C.R, 2002 SCC 86 (WL) [*Chamberlain*].

[661] Factum of the EFC, supra note 625.

[662] *Ibid* at para 12; Charles Taylor, online "Historica Canada", <http://www.thecanadianencyclopedia.ca >.

[663] Factum of the EFC, supra note 625.

[664] Charles Taylor, online: McGill, < https://www.mcgill.ca >.

In the *Carter* factum the EFC had cited a passage from Taylor's text entitled, "Why We Need a Radical Redefinition of Secularism"[665]; an article that was submitted in *The Power of Religion in the Public Square.*[666] The core of Taylor's research had suggested that the concept of secular / secularism should include religious views.[667] This is an important observation that was not mentioned in the actually text of the EFC's factum.[668] It was only indicated at footnote number 9 of the factum, which then referred to page 54 of Taylor's said article,[669] and that had quoted "that there is no *a priori* reason or justification for favoring 'non-religious' views".[670] Therefore, the use of the factum's text was simply limited to the EFC highlighting Taylor's following citation:

> [T]his political ethic can be and is shared by people of very different basic outlooks (what Rawls calls "comprehensive views of the

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[665] Charles Taylor, "Why We Need a Radical Redefinition of Secularism", *part of* Judith Butler, et al, *The Power of Religion in the Public Square* (New York: Columbia University Press, 2011) at 37 [Taylor] cited in Factum of the EFC, supra note 625 at para 12.

[666] *Ibid.*

[667] *Ibid.*

[668] Factum of the EFC, supra note 625.

[669] Taylor, supra note 665 at 54 cited in Factum of the EFC, supra note 625 at fn 9.

[670] *Ibid.*

> good"). A Kantian will justify the rights of life and freedom by pointing to the dignity of rational agency; a utilitarian will speak of the necessity to treat beings who can experience joy and suffering in such a way as to maximize the second. **A Christian will speak of humans as made in the image of God**. They concur on the principles, but differ on the deeper reasons for holding to this ethic. **The state must uphold the ethic, but must refrain from favoring any deeper reasons.**[671]

Despite the Evangelical Fellowship of Canada quoting Taylor's excerpt, which encapsulated a "late-Rawlsian formulation for a secular state"[672] as mentioned it has appeared that the EFC was not completely transparent in their strategy.[673] In the sense that perhaps the EFC's had replaced their reliance on Christian theological doctrines and Bible-based interpretations of the *Charter*[674] – as was found in the *Rodriguez* factum - with the mission that religious-based morality

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[671] Taylor, supra note 665 at 37 cited in Factum of the EFC, supra note 625 at para 12 [capitalization & emphasis added].

[672] *Ibid.*

[673] Taylor, supra note 655 at 37 cited in Factum of the EFC, supra note 625 at para 12.

[674] *Charter, supra* note 148.

and secular morality should have been equally recognized by the courts of laws.[675]

To substantiate this suggestion the EFC's factum had claimed that Charles Taylor's ideology had been asserted by the Supreme Court in the *Chamberlain v. Surrey School District No. 36*[676] Supreme Court decision.[677]

A study of this case has revealed that the legal issue had involved the "Surrey, British Columbia School Board" that had passed a "resolution" that failed to provide approval for the usage of "three books" illustrating tolerance of "same-sex parented families" for kindergarten and first-grade students.[678] The majority of the Court held that the School Board's decision was illegal, ruling that religious-based values could not be an imposition by the school board in their refusal to allow the classrooms to use the books.[679]

The core of the decision had revolved around the notion of "secularism" that lied within section 76 of the *School Act*, which had revealed that "[a]ll schools

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[675] Factum of the EFC, supra note 625.

[676] *Chamberlain, supra* note 660.

[677] *Ibid;* Factum of the EFC, supra note 625 para 13.

[678] *Chamberlain, supra* note 660 para 1.

[679] *Chamberlain, supra* note 660.

and Provincial schools must be conducted on a **strictly secular and non-sectarian principles** […] **highest morality must be inculcated, but no religiously dogma or creed** is to be taught in a school or Provincial school."[680] There are two passages from the *Chamberlain*[681] case that were taken from majority justices that are noteworthy of quoting in order to describe the Court's understanding of secularism.[682]

The first was from Justice Lebel, and was addressed as follows:

> The board reached its decision in a manner so clearly contrary to an obligation set out in the School Act that the decision was rendered illegal. The Act directs the board to conduct all schools on strictly secular and non-sectarian principles. The overarching concern motivating the board allowed itself to be influenced by the unwillingness of some parents to countenance a conflicting point of view and a different way of life. [For instance,] ["[w]e believe, and would like to

[680] *Ibid* at para 18 [capitalization omitted, emphasis & ellipsis added].

[681] *Chamberlain, supra* note 661.

[682] *Ibid.*

> teach our children that according to our religious views, the homosexuality lifestyle is wrong." […] [or] ["I wish to teach my children according to my own religious beliefs and oppose lessons from school […]. A decision taken on such a basis was not secular or non-sectarian […].[683]

Whilst the Chief Justice McLachlin had reasoned that:

> Because religion plays an important role in the life of many communities, these views will often be motivated by religious concerns. Religion is an integral aspect of people's lives, and cannot be left at the boardroom door. **What secularism does rule out, however, is any attempt to use the religious views of one part of the community to exclude from consideration the values of other members of the community.** A requirement of secularism implies that, although the Board is

[683] *Ibid* at Headnote & para 213 [ellipses and words added].

> indeed free to address the religious concerns of the parents, it must be sure to do so in a manner that gives equal recognition and respect to other members of the community. Religious views that deny equal recognition and respect to the members of a minority group cannot be used to exclude the concerns of the minority group.[684]

Paradoxically, in the *Carter* factum the EFC had not mentioned the aforementioned majority's ruling or opinions.[685] The EFC had merely highlighted the following passage of the case[686], which stated that, "**nothing in the Charter, political or democratic theory, or a proper understanding of pluralism demands that atheistically based moral positions trump religiously based moral positions on matters of public policy**."[687] It is paramount to take notice that the EFC had noted at footnote 10 of the factum

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[684] *Ibid* at para 19 [emphasis added].

Fundamentally, the excerpt had exposed Canada as a multicultural nation, which constitutionally values "accommodation, tolerance and respect for diversity", See *Chamberlain, supra* note 660 at para 21.

[685] Factum of the Intervener, supra note 625.

[686] *Chamberlain, supra* note 660.

[687] *Ibid* at para 137 cited in Factum of the Intervener, supra note 625 at para 13 [emphasis added].

that the passage they referred to was part of Justice Gonthier's dissent in the *Chamberlain v. Surrey School District No. 36*[688] Supreme Court decision.[689] The *Chamberlain*[690] case had presented a dichotomy of the concept of secular amongst the Justices.[691] In an article entitled, "The relationship between religions and a secular society"[692], Associate Professor Janet Buckingham, who formerly held the positions of "director, law and policy for the Evangelical Fellowship of Canada" and "General Legal Counsel" for the EFC had noted that in the *Chamberlain* case the Supreme Court had presented several opinions regarding the "roles of the secular state".[693]

Prior to addressing her claims it is interesting to take notice that Professor Buckingham had referenced Charles Taylor when she had noted that for religious followers "religion is the deepest part of who they are", and that to insist that a person acts contrarily to their "religious beliefs or practices" was a

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[688] *Chamberlain, supra* note 660.

[689] *Ibid;* Factum of the Intervener, supra note 625 at fn 10.

[690] *Chamberlain, supra* note 660.

[691] *Ibid;* See also Janet Epp Buckington, "The relationship between religions and a secular society", online: Ontario Human Rights Commission < http://www.ohrc.on.ca >.

[692] *Ibid.*

[693] *Ibid* at 1; Curriculum Vitae – Epp – Buckington, Janet, online: Trinity Western University, < http://www.twu.ca >; *Chamberlain, supra* note 660.

violation of that person's fundamental existence.[694] Professor Buckingham had also claimed that despite Canada's prominent "Judeo-Christian ethos" the *Canadian Charters of Rights and Freedoms*[695] had given rise to Canada's secular movement.[696]

Even though Supreme Court Chief Justice Dickson in *R. v. Big M Drug Mart*[697] had ruled that the interpretation of s. 2(a) of the *Charter*[698] included the "broad right of religious freedom", Buckingham believed that outside the courts of law the real world had shown that "religious teachings and practices [have] often bump[ed] up against the prevailing secular society".[699] This caused the Professor to question the notion of a "secular society".[700] She noted that there were four categories in which "a secular state" could interface with "religion".[701] These classifications included: neutral secular, positive secular,

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[694] Buckington, supra note 691 at 1 fn 1.

[695] *Charter, supra* note 148.

[696] *Ibid;* Buckington, supra note 691 at 1.

[697] *Big M Drug Mart*, *supra* note 490.

[698] *Charter, supra* note 148 at s 2(a).

[699] *Ibid; Big M Drug Mart*, *supra* note 491 cited in Buckington, supra note 691 at 2.

[700] Buckington, supra note 691 at 2.

[701] *Ibid.*

negative secular and inclusive secular.[702] Neutral secular was "non-religious" and non-supportive of "religion", and positive secular affirmed that "[t]he state does not affirm religious beliefs of any particular religion but may create conditions favorable to religion generally".[703] Whilst under negative secular "the state is not competent in matters involving religion but must not act so as to inhibit religious manifestations that do not threaten the common good".[704] The last classification, inclusive secular, asserted that "[t]he state must not be run or directed by a particular religion but must act so as to include the widest involvement of different faith groups, including non-religious".[705]

In the *Chamberlain v. Surrey School District No. 36*[706] Supreme Court case the Justices had presented three different rulings, which resulted in various understandings of the concept of "strictly secular".[707]

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[702] *Ibid.*

[703] *Ibid.*

[704] *Ibid.*

[705] *Ibid.*

[706] *Chamberlain, supra* note 660.

[707] *Ibid*; Buckington, supra note 691 at 2.

According to Professor Buckingham, Chief Justice McLachlin - for the majority – was of an opinion, which gave the impression that the Court leaned towards a "negative secular" classification, but, which was also concerned that "the state was in danger of being directed by a particular religion, which would allow the argument to potentially fit within the definition of 'inclusive secular'."[708] And Justice Lebel had also provided a reasoning that also resonated closely with the definition of "negative secular".[709] Whilst, Justice Gonthier's opinion was in accordance with the "inclusive secular" type.[710] It appears that the EFC in the *Carter* factum had given preference to Justice Gonthier's opinion.[711]

It is paramount to also observe that Professor Buckingham in her article had stated that "[r]eligions generally promote ethical, law-abiding behavior in their adherents. Religious adherents strive to obey the law and respect the authority of the state. Religion thereby fosters 'moral self-government'."[712] An observation that remains important for this thesis, for it has provided supporting evidence from a former legal counselor of the Evangelical

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[708] *Ibid* at 3; *Chamberlain, supra* note 660.

[709] *Ibid;* Buckington, supra note 691 at 3.

[710] *Ibid; Chamberlain, supra* note 660.

[711] *Ibid;* Factum of the EFC, supra note 625 fn 10.

[712] Buckington, supra note 691 at 1 [capitalization omitted].

Fellowship of Canada of the possible pious roles in the realm of legal-making decision.

In furthering the EFC's attempt to harmonize the Court's acceptance of religious morality, the EFC had tried to reintroduce the supremacy of God clause of the *Charter*[713] preamble, and the argument that it should have contributed in the decision-making process of the physician-assisted suicide debate[714] – a submission that was originally presented in the *Rodriguez*[715] Supreme Court factum.[716]

To support this claim the EFC had suggested that Charles Taylor's ideology resonated "in the text of the *Charter*";[717] this was evidenced in the EFC's factum at footnote number 10, which referenced both Justice Gonthier and the supremacy of God clause of the *Charter*[718] preamble.[719] Although not part of

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[713] *Charter, supra* note 148.

[714] Factum of the EFC, supra note 625 fn 10.

[715] *Rodriguez, supra* note 36.

[716] *Ibid;* Factum of the EFC, supra note 625 fn 10; Factum of the CCCB & the EFC, supra note 400; *Charter, supra* note 148.

[717] Factum of the EFC, supra note 625 fn 10; *Charter, supra* note 148.

[718] *Ibid.*

the EFC's *Carter* factum submissions, the continuation of Gonthier's discourse in the *Chamberlain v. Surrey School District No. 36*[720] Supreme Court decision, which appears to have reinforced the contexts found at footnote 10 of the factum, was as follows:

> I note that the preamble of the *Charter* itself establishes that " … **Canada is founded upon principles that recognize the Supremacy of God** and the rule of law." According to the reasoning espoused by Saunders J., if one's moral view manifests from a religiously grounded faith, it is not to be heard in the public square, but if it does not, then it is publicly acceptable. The problem with this approach is that everyone has "belief" or "faith" in something, be it atheistic, agnostic or religious. **To construe the "secular" as the realm of the "unbelief" is therefore erroneous.** Given this, why, then, should the

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[719] *Ibid; Chamberlain, supra* note 660 at para 137 cited in Factum of the EFC, supra note 625 fn 10.

[720] *Chamberlain, supra* note 660.

> religiously informed conscience be placed at a public disadvantage or disqualification?[721]

Thus, in this segment it seems that the EFC in the *Carter* factum had initially attempted to present their submissions in light of the notion of secularism.[722] For instance, the EFC had advised the courts that they would not submit to "biblical texts" and that they wanted "to contribute to this Court's articulation of an overlapping social consensus and non-sectarian political ethic".[723]

However, further research has revealed that quite possibly the EFC had discreetly attempted to convince the Supreme Court that fundamentally the notion of secularism should include religious morality.[724] This was evidenced by judiciously indicating - at paragraph 13 - Justice Gonthier's position in the *Chamberlain*[725] case.[726] More specifically, that the *Charter*[727] does not contain

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[721] *Ibid* at para 137 [emphasis added].

[722] Factum of the EFC, supra note 625.

[723] *Ibid* at para 12 [words added].

[724] Supra note 660.

[725] *Chamberlain, supra* note 660.

[726] *Ibid*; Factum of the EFC, supra note 625 at para 13.

[727] *Charter, supra* note 148.

a clause that requires non-pious morality to supersede religious morality in regards to issues that concern "public policy".[728] Therefore, in accordance to the EFC law should not overlook religious morality in maintaining the prohibition to physician-assisted suicide.

This segment has also revealed that the EFC had discretely sought to once again introduce the supremacy of God clause of the preamble of the *Charter* into the sphere of physician-assisted suicide policies.[729] Paradoxically, the EFC had avoided inserting the term, "Supremacy of God", in the text of the factum's submissions.[730] In lieu, the EFC had chosen to reference in a minuet footnote the use of the term "Supremacy of God" by Justice Gonthier in the *Chamberlain* case.[731] It is paramount to recall that originally the EFC in the *Rodriguez*[732] Supreme Court had attempted to convince the highest court of the land that the *Canadian Charter*[733] had to be read in accordance to a Christian

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[728] *Ibid;* Factum of the EFC, supra note 625 at para 13.

[729] *Ibid* at fn 10.

[730] Factum of the EFC, supra note 625.

[731] *Ibid* at fn 10.

[732] *Rodriguez, supra* note 36.

[733] *Charter, supra* note 148.

interpretation of the "Supremacy of God" clause of the preamble of the Constitution.[734]

iii. *The Belgian Act on Euthanasia:* Etienne Montero

The course of time between the Supreme Court *Rodriguez*[735] and *Carter*[736] cases has revealed that arguments from Christian groups that had supported the absolute ban to physician-assisted suicide procedures had first appeared to evolve. Thus, to oft-casted aside traditional religious discourses and Christian pious interpretations in order to advocate the same conventional dialogues as opponents to physician-assistance to dying procedures.

As an exemplar, in the *Rodriguez* Supreme Court factum the Evangelical Fellowship of Canada and the Canadian Conference of Catholic Bishops' submissions had consisted of an argument that had emphasized a Christian theological support for the sanctity of life.[737] The EFC and the CCCB had insisted that such be perceived under the light of God.[738] Whilst in the *Carter*

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[734] Factum of CCCB & the EFC, supra note 400.

[735] *Rodriguez, supra* note 36.

[736] *Carter* SCC, *supra* note 147.

[737] Factum of CCCB & the EFC, supra note 400 at 14.

[738] *Ibid.*

Supreme Court factum the EFC's argument in regards to the sanctity of life was presented as being part of the "*Charter* Value".[739]

However, further research into the *Carter* factum had identified that the EFC's submission to the sanctity of life was preliminarily introduced as being a **sanctity of life that was a God-given "*sacred trust*"**.[740] Thus, it strongly appears that the EFC Supreme Court *Carter* factum still had held a Christian-based agenda.[741] Perhaps, with the aim to once again implement religious values and morality, in physician-assisted suicide judicial decision-making processes.[742]

As was previously noted by the author William E. Stempsey in "The role of religion in the debate about physician-assisted dying"[743], **"[a]lthough most debates about physician-assisted dying has been carried in secular terms, religious beliefs often lie covertly behind the debate"**.[744] Consequently,

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[739] Factum of the EFC, supra note 625 at paras 2, 8.

[740] *Ibid* at para 10 [emphasis added].

[741] Factum of the EFC, supra note 625.

[742] *Ibid.*

[743] Stempsey, supra note 378.

[744] *Ibid* at 383.

despite a seemingly evolution from the EFC *Rodriguez* factum, which had been composed of Christian religious discourses opposing the legalization of physician-assisted suicide it appears that Stempsey's claim had remained evident in the EFC *Carter* factum.[745]

For instance, in the *Rodriguez* Supreme Court factum the EFC and the CCCB had argued that the legalization of physician-assisted suicide would create a "slippery slope".[746] As previously discussed, in presenting this argument they had referenced, "Thomas G. Dailey, ThD, Director of St. Joseph's College Catholic Bioethics Centre in Edmonton".[747] It is paramount to take notice that this college had advanced and continues to promote academic teachings "from a Catholic perspective".[748]

Subsequently, in their *Carter* factum, the Evangelical Fellowship of Canada had once again presented the submission that permissible physician-assisted suicide would have created a slippery slope that would have lead to abuses

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[745] Factum of CCCB & the EFC, supra note 400; Factum of the EFC, supra note 625.

[746] Factum of CCCB & the EFC, supra note 400.

[747] Dailey, supra note 539.

[748] University of Alberta, St Joseph's College, online: Academics < http://www.stjosephs.ualberta.ca >.

amongst the vulnerable members of Canadian societies.[749] As discussed, this time the EFC had assured the Supreme Court that it had no intention of asserting "the legal authority of a biblical texts",[750] thus a supposition that they would invoke sources that were more commonly employed amongst non-dogmatic opponents to physician-assisted suicide. Even though the EFC's submissions were not direct pious arguments or Christian-based interpretations it remains that the expert opinion of Etienne Montero that the Evangelical Fellowship of Canada had relied upon to substantiate their slippery slope and abuse arguments had been renowned to be inclined by Christian theological teachings and quite possibly to have held a pious mission.[751]

In order to demonstrate that legalized PAS would have created abuses the EFC had briefly noted European euthanasia practices in the Netherlands, and more particularly, in Belgium.[752] The EFC was concerned with the "Affidavit of Jacqueline Herremans" that was presented by the Appellants.[753] According to the EFC, Ms. Herremans, who is the President of Dying with Dignity

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[749] Factum of the EFC, supra note 625 at paras 32, 40.

[750] *Ibid* at para 12.

[751] *Ibid at* para 12.

[752] *Ibid* at paras 40, 42.

[753] *Ibid.*

Belgium[754] had affirmed that in regards to the categories of persons permitted to undertake assistance to dying "The Belgian Federal Control and Evaluation Commission" had taken the position that the *Belgian Act on Euthanasia*[755] was to be interpreted largely.[756] In accordance to the EFC's factum a liberal understanding of the *Belgian Act*[757] included the "legally sanctioning killings" of "newborn babies and blind and deaf twins".[758] The EFC had feared that if

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[754] Department of Justice, Consultations on Physician-assisted Dying – Summary of Results and Key Findings, Annex D: List of Expert Consolations, online: Government of Canada, < http://www.justice.gc.ca > [Government of Canada].

[755] Belgian Act, supra note 343.

[756] *Ibid;* Factum of the EFC, supra note 625 at para 40; Government of Canada, supra note 754.

[757] Belgian Act, supra note 343.

[758] *Ibid;* Factum of the EFC, supra note 625 at para 40.

Belgium remains one of the most advanced European jurisdiction to have legalized assistance to dying,not only has it legalized physician-assisted suicide and voluntary active euthanasia, but has equally extended these practices to include children. Furthering these death practices to include children is not a novelty in Europe, but Belgium has provided for no age restriction; consenting "terminally ill children of any age" may opt for assistance to dying procedures. On March 2, 2014, "Belgium's King Philippe signed into law an amendment to that country's euthanasia law that would open the medically assisted suicide option to children". This novel medical end-of-life law is summarized as follows:

> Under this new law, a child who is terminally ill, who suffers from intolerable and physical pain, whose capacity and judgment ("capacite de discernement") has been verified by a psychologist, and whose parents consent may request medically assisted suicide. (*La Belgique légalise l'euthanasie pour les mineurs*, supra.) Belgium thus has become the first nation to remove all formal age restrictions for euthanasia, although it is not the first to open that option to minors […].

"Canada" were to legalize physician-assisted suicide it would eventually mimic the *Belgian Act*[759] and continuously broaden the scope of persons permitted to undertake assistance to dying procedures.[760] In the attempt to discredit the *Belgian Act*[761] the EFC's factum had referred to the affidavit of Professor Etienne Montero.[762]

Research into the Montero affidavit has demonstrated that Professor Montero is a religiously-inclined academic, and more specifically: a Jesuit-inspired researcher, an anti-euthanasia activist and leading author of such.[763] He has undertaken studies at Catholic universities, and has been actively involved in

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See Belgian Act, supra note 343; Belgian law minors, supra note 366; Boring, supra note 367; William Saunders & Mary Harned, "Now that Belgium Legalized Euthanasia for Terminally Ill Kids, is the United States Next?", online: Life News < http: www.lifenews.com > [ellipsis added].

[759] Belgian Act, supra note 343.

[760] *Ibid;* Factum of the EFC, supra note 625 at paras 40, 41.

[761] Belgian Act, supra note 343.

[762] *Ibid;* Factum of the EFC, supra note 625 at 10 fn 58, 59; *Carter v Canada (Attorney General),* 2015 SCC 5 (Affidavit of Professor Etienne Montero).

[763] *Ibid* at paras 1, 9, 13-14.

Etienne is the Dean and Professor of law of the Faculty of Law of Namur, who has published a book that focuses on the ten years of Belgium's assistance to dying law. See especially, Etienne Montero, *Rendez-vous avec la mort: dix ans d'euthanasie légale en Belgique* (Anthemis, 2013).

teaching and researching at Catholic institutions of higher education that promoted Christianity-based values.[764]

Paragraph 9 of the affidavit has stated that professor Montero has "studied law at the Universite Saint-Louis (Brussels) and at the Universite catholique de Louvain (UCL). [In addition, he] hold[s] a Doctorate in Law, obtained with the highest distinction, from the UCL".[765]

Paragraphs 1 and 12 of Montero's affidavit has attested that the Professor is presently "a legal scholar and lecturer at the University of Namur (Belgium) and Dean of the Faculty of Law," and that he has formerly acted in the capacity of "representative of the Faculty of Law with the Centre Interfacultaire Droit, Ethique, Science de la santé (CIDES) of the University of Namur and facilitated, within that framework, a seminar on bioethics".[766] He was also "the President of the European Institute of Bioethics (EIB, based in Brussels)".[767]

An investigation of the leading institutions that Montero had associated himself with have demonstrated that the Faculty of Law of Namur has prided itself as

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[764] Affidavit of Professor Etienne Montero, supra note 762 at paras 1, 9.

[765] *Ibid* at para 9 [words added].

[766] *Ibid* at paras 1, 12.

[767] *Ibid* at para 12.

being and has associating itself with Jesuit universities.[768] The University's Charter has clearly stated that:

> As a Catholic University, the UNamur adheres more specifically to the educational project of the Society of Jesus. **The university community of the UNamur is heir to the values of the humanistic and Jesuit traditions**. Strengthened by the intellectual pluralism of its members, it finds in these traditions its inspiration and an understanding of its missions […]. The UNamur organizes the dialogue between science, technology, culture and faith in the perspective of their mutual enrichment and invites the university community to take an active part in it. In a free and independent manner, **it contributes to bringing the scientific outlook on the problems of today's world to the attention of society and of the Christian community in particular**; **the University tries to raise awareness within the scientific community of**

[768] Charter of UNamur – University of Namur
online: Université de Namur < https://www.unamur.be/en/institution/charter >.

> **the relationships between knowledge and the values of the Gospel. Moreover, the UNamur provides places where the message of the Gospel can be conveyed to the university community** […].[769]

It is paramount to take notice that Professor Montero was the leading expert witness in the Supreme Court *Carter*[770] case, who was mandated to submit an expert opinion of the effects of *The Belgian Act on Euthanasia*[771] by the Attorney General of Canada and the Attorney General of British Columbia, and by the Attorneys General of Ontario and Quebec - the latters as Interveners.[772]

Per paragraph 16 of the Montero affidavit the mandate that was conferred to the Professor was to provide an expert opinion: on "euthanasia" practices in Belgium, the exercise of the Belgium law by the medical communities, the limitations and control mechanisms, "the slippery slope phenomenon" and the effects of *The Belgian Act on Euthanasia* on the "vulnerable" segments of the

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[769] *Ibid* [emphasis & ellipses added].

[770] *Carter* SCC, *supra* note 147.

[771] Belgian Act, supra note 343.

[772] *Ibid; Carter* SCC, *supra* note 147; Affidavit of Professor Etienne Montero, supra note 762.

Belgium population.[773] The Professor's conclusions were negative on all counts.[774]

Thus, in form of an affidavit supporting alleged Belgium evidence the Attorney General of Canada in the Supreme Court *Carter* case had provided Montero's affidavit, which indicated that Belgium's law was ineffective in preventing abuses.[775]

Professor Montero's research on Belgium's assistance to dying regime had not persuaded the *Carter*[776] Supreme Court to maintain the Canadian prohibition to physician-assisted suicide.[777] Not only due to the fact that his research had focused on non-relevant cases such as "minors or persons with psychiatric orders or medical conditions", but also because of the impact of Belgium's way-of-life.[778] The Canadian Supreme Court had reasoned that:

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[773] *Ibid* at para 16.

[774] Affidavit of Professor Etienne Montero, supra note 762.

[775] *Ibid; Carter* SCC, *supra* note 147.

[776] *Ibid.*

[777] *Ibid.*

[778] *Ibid* at para 111.

We are not convinced that Professor Montero's evidence undermines the trial judge's findings of fact. First the trial judge (rightly, in our view) noted that the permissive regime in Belgium is the product of very different medico-legal culture. Practices of assisted death were "already prevalent and embedded in the medical culture" prior to legalization (para. 660). The regime simply regulates a common pre-existing practice. In absence of a comparable history in Canada, the trial judge concluded that it was problematic to draw inferences about the level of physician compliance with legislated safeguards based on Belgian evidence (para. 680). This distinction is relevant both in assessing the degree of physician compliance and in considering evidence with regards to the potential for a slippery slope.

Second, the cases described by Professor Montero were that of an oversight body exercising discretion in the interpretation of the safeguards and restrictions in the Belgian legislative regime – a discretion the Belgium Parliament has not

> move to restrict. Theses cases offer little insight into how a Canadian regime might operate.[779]

Conceivably, it could be the subject of debate that Professor Montero's research was based on a Christian-inspired prohibition to assistance to dying that could have resulted in the production of questionable evidence. For instance, the expert witness was referenced in the Evangelical Fellowship of Canada's *Carter* factum, and his affidavit had linked him with religious institutions that endorsed Jesuit traditions.[780]

A further paradox was created by the fact that the Attorney General of Canada in its mandate to maintain the blanket prohibition to physician-assistance suicide per the *Criminal Code of Canada*[781] in the Supreme Court *Carter*[782] case had requested Etienne Montero to deliver this affidavit.[783] Due to Montero's moral commitment to undertake research in accordance to the Jesuit's tradition it is quite possible that the Attorney General of Canada had

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[779] *Ibid* at paras 112-113.

[780] Factum of the EFC, supra note 625; Affidavit of Professor Etienne Montero, supra note 762.

[781] *Criminal Code*, *supra* note 55.

[782] *Carter* SCC, *supra* note 147.

[783] *Ibid;* Affidavit of Professor Etienne Montero, supra note 762 at para 16; *Criminal Code*, *supra* note 55.

intentionally sought out the expert opinion of Etienne in hopes that he would have posed as the ideal gatekeeper to sustain the absolute blanket prohibition to Canada's physician-assisted suicide law.

Summary of Chapter I of Part Two

In this segment of the dissertation it has been first revealed that in Canada the physician-assisted suicide debate of the *Rodriguez*[784] Supreme Court had attracted the intervention of the Canadian Conference of Catholic Bishops and of the Evangelical Fellowship of Canada.[785]

As Interveners, the CCCB and the EFC had attempted to convince the Supreme Court that the absolute ban to physician-assisted suicide should have been maintained through religious beliefs.[786] These Christian Groups had provided legal submissions that read that the *Canadian Charter of Rights and Freedoms*[787] should have been interpreted in accordance to a Christian agenda, which insisted that the law had needed to recognize and apply the supremacy of God clause of the preamble of the *Charter* with the same legal importance

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[784] *Rodriguez, supra* note 36.

[785] *Ibid;* Factum of CCCB & the EFC, supra note 400.

[786] *Ibid.*

[787] *Charter, supra* note 148 (more specifically, section 7).

and weight as with preamble's rule of law clause.[788] However, evidence has shown that the Supreme Court has been hesitant to abide to such.[789]

The CCCB and the EFC had also attempted to influence the Supreme Court that physician-assisted suicide should have remained an impermissible practice because the sanctity of life was to be defined and find meaning through theological beliefs that fundamentally held that life was a sacred entity because life belonged to God and only He was able to determine the timing of a patient's end of life.[790] This essay then proceeded to provide arguments pertaining to God's property rights and the various positions that have governed this debate.[791]

It remains that in their *Rodriguez* Supreme Court factum, the CCCB and the EFC had provided open and apparent religious submissions in order to advocate the absolute ban to physician-assisted suicide per the *Criminal Code*.[792]

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[788] *Ibid;* Factum of CCCB & the EFC, supra note 400; See Interpreting s. 7 of *The Charte*r Through the Preamble of the Charter: the Supremacy of God Clause, above, for more on this topic.

[789] *Ibid.*

[790] Factum of CCCB & the EFC, supra note 400; See Life Affirming Principles: The Sanctity of life and God's Property Rights, above, for more on this topic.

[791] *Ibid.*

The *Rodriguez*[793] precedent led an awarding winning author to question whether the prohibition to physician-assisted suicide was rooted in a Christian-based prohibition to physician-assisted suicide.[794] According to the author, if this claim would have been considered by the *Rodriguez* Court and evidenced then section 241*(b)* of the *Criminal Code*[795] would have had to be declared unconstitutional because the purpose of the disposition would have held a Christian objective.[796]

Despite the legal principle of stare decisis, the Supreme Court had agreed to rule upon a subsequent physician-assisted suicide debate.[797] The EFC had once again acted in the capacity of Intervener in the *Carter*[798] Supreme Court case.[799] In contrast with their *Rodriguez* factum, the EFC had attempted to provide non-religious submissions, with a sanctity of life interpretation that

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[792] *Criminal Code, supra* note 55 (more specifically, section 241*(b)*).

[793] *Rodriguez, supra* note 36.

[794] *Ibid;* Jugnauth, supra note 551; See The Religious Objective of s. 241(b) of the *Criminal Code*, above, for more on this topic.

[795] *Criminal Code, supra* note 55.

[796] *Ibid;* Jugnauth, supra note 551; See The Religious Objective of s. 241(b) of the *Criminal Code*, above, for more on this topic.

[797] *Carter* SCC, *supra* note 147.

[798] *Ibid.*

[799] *Ibid;* Factum of the EFC, supra note 625.

was not dogmatic.[800] They had also attempted to uphold the notion of a secular state.[801] Nonetheless, research – which, included the EFC's reference to Montero's affidavit[802] - has shown that in their *Carter* Supreme Court factum the Evangelical Fellowship of Canada's role in preventing the legalization of physician-assisted suicide had still relied on religious influences, but which were discrete and at times nearly unapparent.[803]

Thus, even though, it remains plausible that they "[did] not come to this Court to assert the legal authority of a biblical text"[804], nonetheless it would be incorrect to conclude that their submissions were not still inspired by Christianity's religious undertone.

[800] *Ibid;* See A Non-Dogmatic Sanctity of Life, above, for more on this topic.

[801] Factum of the EFC, supra note 625; See The Secular State, above, for more on this topic.

[802] Affidavit of Professor Etienne Montero, supra note 762; See *The Belgian Act on Euthanasia*: Etienne Montero, above, for more on this topic.

[803] *Ibid;* Affidavit of Professor Etienne Montero, supra note 762.; Factum of the EFC, supra note 625.

[804] *Ibid* at para 12.

Chapter II – Ensuring the Accuracy of the History of Christianity's Stance of Suicide and its Assistance in Physician-Assisted Suicide U.S. Court Debates

Preface

This chapter of the dissertation will provide evidence that American Christian groups and faith-followers – in their capacity as Amici Curiae - have attempted to ensure the accuracy of the history of Christianity's stance of suicide, and its assistance, in physician-assisted suicide court debates.

In the *Compassionate v. Washington*[805] en banc case, Justice Reinhardt's analysis of the history of Christians and suicide led to his conclusion that suicide was an acceptable practice amongst early Christian-faith followers.[806] This case was latter appealed to the Supreme Court of the United States and is commonly referred to as the *Glucksberg*[807] case.[808]

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[805] *Compassion in Dying v Washington*, 79 F (3d) 790 (9th cir. 1996) (OpenJurist) [*Compassion in Dying, en banc*]; See especially OpenJursit: Legal Resources, online: http//:www.openjurist.org > (the decision is in concise numbered paragraphs).

[806] *Ibid* at paras 76 – 78.

[807] *Glucksberg, supra* note 114.

[808] *Compassion in Dying v. Washington*, 79 F (3d) 790 (9th Cir. 1996), cert. granted sub nom, *Washington v. Glucksberg*, 521 US 702 (1997).

The *Compassionate in Dying*[809] en banc decision had caused many pious groups and faith-following individuals to submit briefs to the Supreme Court, in order to scrutinize the correctness of Justice Reinhardt's findings.

In defending this dissertation's hypothetical question - what were the roles of Christian groups and discourses in the realm of North American judicial physician-assistance to suicide debates? - and in order to reveal that in the United States this role has consisted in ensuring the accuracy of historical Christianity and suicide, and its assistance, the research of this section of this dissertation has predominately focused on Justice Reinhardt's repertoire in the *Compassionate in Dying*[810], en banc decision, Justice Rehnquist's discourse in the *Glucksberg*[811] Supreme Court case, along with the relevant Supreme Court *Glucksberg*[812] and *Quill*[813] religious Amici Curiae briefs, and supporting case law and pertinent documentation.

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[809] *Compassion in Dying, en banc, supra* note 805.

[810] *Ibid.*

[811] *Glucksberg*, *supra* note 114.

[812] *Ibid.*

[813] *Quill*, *supra* note 114.

A. The Federal American Physician-Assisted Suicide Case Law

1. A Review of the *Washington v. Glucksberg* and *Vacco v. Quill* Constitutional Issues

A brief review of the constitutional issues between the Supreme Court *Glucksberg*[814] and *Quill*[815] cases has revealed that in the latter the respondents had not claimed that physician-assisted suicide was a fundamental liberty interest protected by the *Fourteenth Amendment of the U.S. Constitution*[816], but that instead it had merited protection under the equal protection clause of the *Fourteenth Amendment*[817]; due to its resemblance to the right-to-refusal of "life-saving medical treatment", and the notion of "double effect" linked to "palliative care".[818]

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[814] *Glucksberg*, *supra* note 114.

[815] *Quill, supra* note 114.

[816] *U.S. Const amend XIV*; See, A Concise Lexicon of United States Constitutional Law, above, for more on this topic.

[817] *Ibid; U.S. Const amen XIV.*

[818] *Ibid; Quill*, *supra* note 114 at **2294, **2296, **2297; See The *Cruzan* Precedent in United States Supreme Court Physician-Assisted Suicide Cases, above, for more on this topic; See A Concise Lexicon of United States Constitutional Law, above, for more on this topic.

In contrast, in the *Glucksberg*[819] decision respondents had argued that physician-assisted suicide was a fundamental constitutional right, and that the provision of the Washington statute – *Washington's Natural Death Act*[820] – prohibiting physician-assisted suicide had violated the liberty interest of the *Fourteenth Amendment Due Process Clause.*[821]

In both instances, the Supreme Court did not concur with the respondents.[822]

For the purpose of this thesis, it is the *Glucksberg*[823] case that remains relevant. For during the *Glucksberg* era part of the Court's determination of the existence of a non-enumerated fundamental constitutional right via the *Fourteenth Amendment of the U.S. Constitution* consisted of an historical

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[819] *Glucksberg*, *supra* note 114.

[820] Wash. Rev. Code § 9A.36.060(1) states that:

> A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide.

See *Washington Natural Death Act* (RCW 70.245) cited in *Glucksberg*, *supra* note 114 at **2261.

[821] *Glucksberg*, *supra* note at **2261, **2262; *U.S. Const amend XIV;* See, The United States Supreme Court Decisions, above, for more on this topic; See, A Concise Lexicon of United States Constitutional Law, above, for more on this topic.

[822] *Glucksberg*, *supra* note 114; *Quill*, *supra* note 114.

[823] *Glucksberg*, *supra* note 114.

analysis of the alleged right.[824] Thus, in the *Glucksberg*[825] case in order to aid in the conclusion that the liberty interest protected by the *Fourteenth Amendment of the U.S. Constitution*[826] did not constitutionally include the practice of physician-assistance to suicide, Justice Rehnquist – on behalf of the majority - had undertaken an historical analysis of the practice of suicide and its assistance, which had omitted prior eras that the lower court had addressed.[827] These excluded time periods had remained imperative for they had previously advanced the claim that the role of Christianity had been a positive influence in the history of the acceptance of suicide and physician-assisted suicide.[828] Thus, it remained paradoxically that Justice Rehnquist's "deep-root test" had discreetly emphasized a Christian-dominated prohibition to suicide and its assistance.[829]

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[824] *Ibid.*

[825] *Ibid.*

[826] *U.S. Const amend XIV*.

[827] *Ibid; Glucksberg*, *supra* note 114.

[828] See *Compassion in Dying, en banc, supra* note 805 at paras 76 - 78.

[829] *Glucksberg*, *supra* note 114.

2 - *Compassion in Dying v. Washington, en banc*, the Ninth Circuit, cert. granted sub nom *Washington v. Glucksberg*

i. The Majority Opinion per Justice Reinhardt

Preceding the *Glucksberg v. Washington*[830] Supreme Court decision, the U.S. District Court had granted a summary judgment for the plaintiff, who had sought the unconstitutionality of a statute that banned physician-assisted suicide.[831] Whilst, the United States Court of Appeals for the Ninth Circuit had reversed that decision.[832] The decision was reheard by the, en banc Nine Circuit Court, which had ruled that the ban was unconstitutional.[833]

In the *Compassion*[834]*, en banc* decision, Justice Stephen Reinhardt – on behalf of the majority - had affirmed the "District Court's decision" that, "the 'or aids' provision of Washington statute RCW9A.36.060, as applied to the prescription of life-ending medication for use by terminally ill, competent adult patient who

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[830] *Ibid.*

[831] *Ibid; Compassion in Dying v Washington,* 850 F Supp 1454 (Wash 1994).

[832] *Compassion in Dying v Washington,* 49 F (3d) 586 (9th Cir 1996) [*Compassion in Dying, appeal*].

[833] *Compassion in Dying v Washington, en banc, supra* note 805.

[834] *Ibid.*

wish to hasten their deaths, violate[d] the Due Process Clause of the Fourteenth Amendment".[835] The Justice had concluded that an implicit fundamental right in a person's determination of his/her "time and manner of death" was protected under the liberty interest of the *Fourteenth Amendment of the U.S. Constitution.*[836]

In arriving to his conclusion, an in-depth study of the *Compassion in Dying*[837] *en banc*, decision has revealed that Justice's inquiry into the constitutionality of a "liberty interest […] determining the time and manner of one's death", in the domain of physician-assisted suicide held a resemblance to previous "abortion cases": both had non-exhaustively involved a review of "historical evidence" and had brought forth "**religious**" issues and challenges.[838]

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[835] *Ibid* at paras 22, 25, 198 - 199 [word modified]; *U.S. Const amend XIV;* Wash. Rev. Code § 9A.36.060(1), supra note 821.

[836] It is interesting to note that Justice Reinhardt was not inclined to employ the terminology "physician-assisted suicides", instead the Justice opted for the phrases: "the right-to die, 'determining the time and manner of one's death,' and 'hastening one's death'."

See *Compassion in Dying, en banc, supra* note 805 at paras 48, 108 - 109, 200; *U.S. Const amend XIV*; Darrel W Amundsen, "The Ninth Circuit Court's Treatment of the History of Suicide By Ancient Jews and Christians in Compassion in Dying v. State of Washington: Historical Naiveté or Special Pleading? (1998) 13 Issues L & Med 365 at 423 (WL).

[837] *Compassion in Dying, en banc, supra* note 805.

[838] Further noting that a lack of appropriate legalization of "right to medical assistance" had resulted in "abortions and assisted suicides flourish[ing] in back alleys, in small street side clinics, and in the privacy of the bedroom […] often with tragic consequences".[838]

See *Compassion in Dying v. Washington, en banc, supra* note 805 at paras 41, 42 [emphasis & ellipses added].

Thus, inspired by the role that history had provided in *Roe v. Wade*"[839] in finding an implicit fundamental right to abortion, Justice Reinhardt had undertaken an examination of "ancient attitudes" to suicide.[840] His analysis began with ancient "Greek and Roman times"; eras that demonstrated that self-murdered were oft-found to be praiseworthy.[841] These studies further lead the Justice to examine suicide, and assisted suicide practices, that had been accepted amongst "early Christians", which included: discourses pertaining to the death of prominent Biblical characters, the practice of martyrdoms as being equivalent to suicide, and Augustine's ban of early Christian suicides.[842]

In a sixty-page ruling, the Justice's Christian historical analysis had revealed that the history of Christianity had been favorable towards suicide, and that suicide had been a common practice amongst the antiquity of Christianity.[843]

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[839] *Roe v Wade*, 410 US 113 (1973) cited in *Compassion in Dying v. Washington*, *en banc, supra* note 805 at para 64.

[840] *Compassion in Dying v. Washington*, *en banc, supra* note 805 at para 64.

[841] *Ibid* at paras 64 et s.

[842] *Ibid* at paras 76–78.

[843] *Ibid.*

For the purpose of this dissertation, the highly relevant passages of the case consists of paragraphs, 76 to 78[844], and are as follows:

> The early Christians saw death as an escape the tribulations of a fallen existence and as the doorway to heaven. "In other words, the more powerfully the Church instilled in believers the idea that this world was a vale of tears and sin and temptation, where they waited uneasily until death released them into eternal glory, the more irresistible the temptation to suicide became." The Christian impulse to martyrdom reached its height with the Donatists, who were so eager to enter into martyrdom that they were eventually declared heretics. Gibbon, in the Decline and Fall of the Roman Empire, described them this way:
>
> They sometimes forced their way into courts of justice and compelled the affrighted judge to give orders for their execution. They frequently stopped travellers on the public highways and

[844] *Ibid.*

obliged them to inflict the stroke of martyrdom by promise of a reward, if they consented--and by the threat of instant death, if they refused to grant so singular a favour.

St. Augustine said of the Donatists, "to kill themselves out of respect for martyrdom is their daily sport." […] Prompted in large part by the utilitarian concern that the rage for suicide would deplete the ranks of Christians, St. Augustine argued that committing suicide was a "detestable and damnable wickedness" and was able to help turn the tide of public opinion. […] Even staunch opponents of a constitutional right to suicide acknowledge that "there were many examples of Christian martyrs whose deaths bordered on suicide, and confusion regarding the distinction between suicide and martyrdom existed up until the time of St. Augustine (354-430 A.D.)."[845]

[845] *Ibid* [ellipses added].

It remained that Justice Reinhardt's use of the antiquity of Christianity to demonstrate that historically suicide was a frequent practice amongst Christians had also created a rebuttal amongst legal academics.

For instance, in the Harvard Journal of Law & Public Policy, authors, Dwight Duncan and Peter Lubin, had published, "The Use and Abuse of History in *Compassion in Dying*"[846], a publication that illustrated the significant concern over the paramount function that "history" has held in the determination of "implicit fundamental rights" in the courts of law.[847]

Pertinent to this dissertation were the authors' reference to the *Cruzan v. Director Missouri Department of Health*[848], and the *Compassion in Dying*[849] cases in order to demonstrate the importance of conducting an historical exercise in the right-to-die arena.[850]

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[846] Dwight G. Duncan & Peter Lubin, "The Use and Abuse of History in *Compassion in Dying*" (1996) 20:1 Harv JL and Pub Policy 175 (WL); Professor Duncan is currently a professor at the University of Massachusetts School of Law-Dartmouth, online: Umass Darmouth, UMass Law Faculty < www.umassd.edu>.

[847] According to the authors, notwithstanding the *Roe v. Wade* case, the Supreme Court has observed that there should not be a continual acknowledgement of "new fundamental rights", See Dwight & Lubin, supra note 846 at 177; *Roe, supra* note 840.

[848] *Cruzan, supra* note 84.

[849] *Compassion, en banc, supra* note 805.

[850] Dwight & Peter Lubin, supra note 846 at 177, 178.

Per previous presentations in this dissertation,[851] in *Cruzan*[852], the Court had examined the right to refuse life-sustaining medical treatment and the procedure's constitutional protection in light of the liberty interest of the *Fourteenth Amendment of the U.S. Constitution*.[853]

Duncan and Lubin had noted that the *Cruzan* Court had not acknowledged "a right to physician-assisted suicide or even a fundamental right to suicide *tout court*",[854] citing former proponent to physician-assisted suicide and late Supreme Court Justice Scalia, who had asserted that "there is no significant support for the claim that a right to suicide is so rooted in our tradition that it may be deemed fundamental or implicit in the concept of ordered liberty".[855]

It appears that in Duncan and Lubin's work, Justice Scalia's words had motivated the authors to further explore Justice Reinhardt's "use of history" to aid in his finding of a fundamental constitutional right to physician-assisted

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[851] See The Supreme Court *Cruzan* Case & The *Cruzan* Precedent in the Supreme Court Physician-Assisted Suicide Cases, above, for more info on this topic.

[852] *Cruzan, supra* note 84.

[853] *Ibid; U.S. Const. amend XIV;* Dwight & Peter Lubin, supra note 846 at 177; See The Supreme Court *Cruzan* Case & The *Cruzan* Precedent in the Supreme Court Physician-Assisted Suicide Cases, above, for more info on this topic.

[854] *Cruzan v Missouri* cited in Dwight & Peter Lubin, supra note 846 at 177; *Cruzan, supra* note 84.

[855] *Ibid; Cruzan v Missouri* cited in Dwight & Lubin, supra note 846 at 177.

suicide.[856] The authors' examination concluded that the Justice's interpretation of the history of suicide was inaccurate, and that the *Compassion in Dying*[857], *en banc* court had merely created "new law",[858] noting that "descent respect for the opinions of […] **religious traditions**, and legal history", should have been observed by Justice Reinhardt.[859]

Several other authors were also bewildered by Justice Reinhardt's opinion on the historical standing of suicide and assisted suicide in Christian antiquity.

The Justice's arguments of the antiquity of Christianity and its common practice of suicide was found to be inaccurate in "Historical and Biblical References in Physician-Assisted Suicide Court Opinions".[860] The authors, O'Mathúna and Amundsen, claimed that "**religious traditions" influenced the outcome of "physician-assisted suicide" discourses and its "public policy"**,

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[856] *Ibid* at 178; *Cruzan, supra* note 84.

[857] *Compassion in Dying v Washington*, *en banc, supra* note 805.

[858] *Ibid;* Duncan & Lubin, supra note 846 at 213.

[859] *Ibid* (emphasis added); *Compassion in Dying v Washington*, *en banc, supra* note 805.

[860] *Ibid;* Donal P. O'Mathúna and Darrel W. Amundsen, "Historical and Biblical References in Physician-Assisted Suicide Court Opinions" (1998) 12 Notre Dame JL Ethics & Pub Pol'y 473 (Symposium on the Beginning and End of Life) (WL).

and that it was regrettable that the *Compassion in Dying*[861] en banc decision had been influenced by Justice Reinhardt's putative erroneous "theological and historical" misrepresentations.[862]

In accordance to Amundsen and O'Mathúna, these inaccuracies had included Reinhardt's misconception about: 1) the Bible's lack of condemnation of suicide and the positive attributes that were linked to the act; 2) that martyrdom was viewed as suicide; 3) the allegation that Christians once sought dying in order to enter heaven as quickly as possible; 4) and that Christians only prohibited suicide after Augustine censured the practice due to fear of a demise of the Christian population.[863]

The authors professed that **due to the paramount influence of "Judeo-Christian traditions in America" that it was imperative to fully comprehend ecclesiastical teachings and the Christian history in the "judicial and legislative" rhetoric pertaining to "suicide and euthanasia"**[864], and that it remained essential to ensure that distortions, which

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[861] *Compassion in Dying, en banc, supra* note 805.

[862] *Ibid;* O'Mathúna and Amundsen, supra note 860 at 474.

[863] *Ibid* at 476, 477; *Compassion in Dying, en banc, supra* note 806.

[864] O'Mathúna and Amundsen, supra note 860 at 474 [emphasis added].

may stem from any "religious tradition" to refrain from influencing the establishment of "public policy" on medical-assistance to dying.[865]

Whilst, in another publication[866], Professor Amundsen had claimed that "Justice Reinhardt's treatment of the issue of suicide in early Christianity [was] so historically and conceptually muddled as to be fundamentally inaccurate."[867] In footnote 138 of said article, the Justice was deemed to have concluded a "theological judgment", which he was not competent to render.[868]

Despite the aforementioned claims that have criticized Justice Reinhardt use of a warped pious history to influence the claim that suicide was once practiced amongst Christians, perhaps these assertions remained baffling, because in the *Compassionate in Dying*[869] en banc case, it was Justice Reinhardt, who had

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[865] *Ibid.*

[866] Amundsen, supra note 836.

[867] *Ibid* at 423.

[868] Professor Amundsen had also noted that the probability of "theologians" concurring with Justice Reinhardt's opinion was minuet. The author had suggested that the Justice's discourse of historical Christian beliefs in concerns to suicide was compatible when compared to various works prepared by "philosophers, sociologists, anthropologists, psychologists, and popular authors". Nonetheless, the author insisted that these latter works, along with the controversial opinion of Judge Reinhardt were flawed.

See Amundsen, supra note 836 at 423 fn 138.

[869] *Compassion in Dying v Washington*, *en banc, supra* note 805.

cautioned that "**one's religious training** […] and the moral standards one establishes and seeks to observe, are all **likely to influence and to color one's thinking and conclusions** (…)".[870]

Nonetheless, further research has revealed that Justice Reinhardt was not the only justice to have found that historically Christianity was accepting of suicide.[871] This avow had been evidenced in a judicial opinion, in *People v. Kevorkian*.[872]

An examination of this opinion has revealed that the State of Michigan had enacted legislation prohibiting the assistance of suicide.[873] Dr. Kevorkian had been charged with violating the Michigan statute.[874] Kevorkian had sought a "motion to dismiss" and had challenged the Michigan law on the grounds that it was "unconstitutional".[875] Notwithstanding the denial of the motion; amongst

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[870] Taken from "the Court's cautionary note in *Roe v. Wade* 410 U.S. 113, 116, 93 S. Ct. 705, 708, 35 L.Ed.2d 147 (1973)" cited in *Compassion in Dying v. Washington*, *en banc, supra* note 805 at para 34 [emphasis & ellipsis added]; *Roe, supra* note 840.

[871] O'Mathúna and Amundsen, supra note 860 at 474; *People v. Kevorkian*, No 93-11482 (Mich Cir Ct, 1993) (WL 603212 Unpublished Opinion) [*Kevorkian*].

[872] *Ibid* at *1; O'Mathúna and Amundsen, supra note 860 at 474.

[873] *Ibid; Kevorkian*, *supra* note 871.

[874] *Ibid;* O'Mathúna and Amundsen, supra note 860 at 474.

several defenses that were submitted, by Kevorkian - according to Justice Kaufman - the one argument that was merited of adjudication was the defense that "section 7(1)" of the Michigan Statute had violated the liberty interest of the *Due Process Clause of the Fourteenth Amendment*.[876] Justice Kaufman had found that the "clause" of the Michigan law was "overbroad with respect to a person's liberty interest in committing rational suicide."[877]

Much the same, as Justice Reinhart in the *Compassion in Dying*[878] *en banc* case, in succumbing to his opinion, Justice Kaufman, had conducted an analysis of Christian history and "beliefs", in order to demonstrate that "in our traditions and history" suicide and assisted suicide had once been a frequent practice amongst early Christianity.[879] To substantiate his findings, as an exemplar, Kaufman's historical analysis had consisted of examining the "cult

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[875] The "motion to dismiss [was] denied" due to "constitutional challenges" that were found to be "without merit or premature".

See *Kevorkian*, *supra* note 871 at *1, *6; O'Mathúna and Amundsen, supra note 860 at 474. [word replaced].

[876] *Ibid; Kevorkian*, *supra* note 871 at *1, *6; *U.S. Const. amend XIV*.

[877] *Kevorkian*, *supra* note 871 at *20.

[878] *Compassion in Dying, en banc, supra* note 805.

[879] *Kevorkian*, *supra* note 871 at *11, *12; O'Mathúna and Amundsen, supra note 860 at 474, 475.

of martyrdom" amongst Christians, and by referencing the possibility that Jesus had committed "a kind of suicide".[880]

Paradoxically, Justice Kaufman and Justice Reinhardt had been meticulous by forewarning that a "historical analysis […] cannot be the sole determiner"[881] of a fundamental liberty interest, and vice versa, that "historical evidence alone is not a sufficient basis for rejecting a claimed liberty interest"[882].

It remained that the *Compassionate in Dying*[883] en banc case, made its path to the U.S. Supreme Court, not only to contest the ruling, but to cast doubt upon Justice Reinhardt's stance on early Christianity.[884]

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[880] *Kevorkian*, *supra* note 871 at *11, *12.

[881] *Ibid* at *7 [ellipsis added].

[882] Contrarily to the, *Compassion In Dying,* appeal case, where the justices were of the opinion that the undertaking of a solo "historical analysis" was enough to determine that a substantive liberty interest to the physician-assistance to suicide did not exist, Reinhardt did not concur.

The *Compassion In Dying*, appeal court had ruled that "a constitutional right to aid in killing oneself" had been "unknown in the past".

However, Justice Reinhart warned the court that relying merely on "historical evidence" that was available only at the time that the Fourteenth Amendment was enacted would be counterproductive, in doing so, abortion would have never been legalized, and that the pertinent "historical record" pertaining to suicide and its assistance was "far more checkered then the majority of the of the [*Compassion In Dying* appeal court] would have us believe".

See *Compassion in Dying v. Washington*, *appeal, supra* note 832 cited in *Compassion in Dying, en banc, supra* note 805 at paras 59, 61, 62, 63.

[883] *Compassion in Dying, en banc, supra* note 805.

[884] *Ibid; Glucksberg*, *supra* note 114.

3. The Supreme Court *Washington v. Glucksberg* case

i. The Majority Opinion per Justice Rehnquist

By contrast, with Justice Reinhardt's' opinion in the *Compassion in Dying*[885] *en banc* decision, in the *Glucksberg*[886] case Judge Rehnquist's historical analysis of suicide, and its assistance had completely omitted the time periods pertaining to the antiquities of ancient Roman and Greece, and most importantly for the purpose of this dissertation, the Christian eras that were brought forth by the inferior court.[887] This was evidenced by the fact that Justice Rehnquist - in his "deep-root test" - had commenced his historical examination of suicide as of the "thirteenth century"[888].

Inspired by the opinion of Justice Scalia in the *Cruzan*[889] case, Rehnquist had contented that the history and tradition of the prohibition of suicide and physician-assisted suicide had debuted with "British Common Law".[890]

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[885] *Compassion in Dying, en banc, supra* note 805.

[886] *Glucksberg*, *supra* note 114.

[887] *Ibid;* O'Mathúna and Amundsen, supra note 860 at 473.

[888] *Glucksberg*, *supra* note 114 at **2263.

[889] *Cruzan v. Director, Missouri Department of Health*, *supra* note at 84.

Thus, in accordance to Rehnquist the prohibition to suicide, and its assistance had been "deeply rooted" in history "for over 700 years" and during those time periods there had never existed a recognized acceptance of self-murder or physician-assisted suicide.[891] The Justice had concluded that the liberty interest of the *Fourteenth Amendment Due Process Clause of the U.S. Constitution* was not to be expanded to include physician-assisted suicide.[892]

Several authors had observed the discrepancies between Justice Reinhardt and Justice Rehnquist in their analyses of the history and traditions of suicide and its assistance.

Amongst them, in an article entitled "Fundamentally Flawed: Tradition and Fundamental Rights"[893], the author Adam B. Wolf, contended that a justice's analyze of "tradition" could provide a mistaken explanation, and that an "historical interpretation" may be misleading in the attempt to achieve a preferred ruling.[894] The judicial "opinions" derived from the history and tradition analysis plausibly "demonstrate the malleability and subjectively of

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[890] *Ibid* at **2263; O'Mathúna and Amundsen, supra note 860 at 473.

[891] *Glucksberg*, *supra* note 114 at **2263.

[892] *Ibid*; *U.S. Const. amend XIV*.

[893] Adam B. Wolf, "Fundamentally Flawed: Tradition and Fundamental Rights" (2002) 57 U Miami L Rev 101 (WL).

[894] *Ibid* at 128.

tradition, including the importance of jurists' positionality in issuing a tradition-based fundamental opinion."[895]

In American physician-assisted suicide judicial debates, Wolfe claimed that the use of "tradition in fundamental rights analysis" had proven to be an exercise that may cause uncertainty; for "fundamental rights" are being subject to the "whims of judges account of history".[896] According to Wolfe, this was evidenced in the *Compassion in Dying*[897] en banc decision, and in the *Glucksberg*[898] Supreme court case, for each justice had "looked to the same tradition, yet came up with disparate results" in the determination of whether or not physician-assisted suicide was a fundamental right.[899]

In another publication entitled "*Washington v. Glucksberg* and *Vacco v. Quill: An Analysis of the Amicus Curiae Briefs and the Supreme Court's Majority and*

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[895] *Ibid* .

[896] *Ibid.*

[897] *Compassion, en banc, supra* note 805.

[898] *Glucksberg, supra* note 114.

[899] *Ibid;* Wolf, supra note 893 at 130; *Compassion, en banc, supra* note 805.

Concurring Opinions"[900] - published in the Saint Louis University Law Journal – author Frederick R. Parker had taken notice that several "amicus briefs" had provided disputations of the history and traditions of suicide and its assistance to the Supreme Court.[901] Notwithstanding these arguments, in accordance to Parker, "the *Glucksberg* Supreme Court had "not fully addressed the historical perspective presented in these [Amici Curiae] briefs."[902] Noting, for instance that "there is a strong historical tradition accepting, and often honoring, terminally ill persons who choose a timely and dignified death in the face of unrelenting and endurable suffering."[903]

Despite Justice Rehnquist's adjudication of a non-existing constitutional right to physician-assisted suicide, which consisted of an analysis that was silent on examining the entirety of the history of Christianity and suicide, it remains that Christian groups and faith-followers had attempted to ensure that the Supreme Court would take notice of the exactitude of the antiquity of Christians and their beliefs on suicide. This was predominantly evidenced with the reaction

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[900] Frederick R Parker Jr, "*Washington v Glucksberg and Vacco v Quill: An Analysis of the Amicus Curiae Briefs and the Supreme Court's Majority and Concurring Opinions"* (1999) 43 St Louis ULJ 469.

[901] *Ibid* at 477.

[902] *Ibid* [words added].

[903] The American Civil Liberties submitted the Amicus Curiae brief. See Parker, supra note 900 at 477, fn 44, 478.

that was caused by the lower court's *Compassion in Dying v. Washington*[904] *en banc* decision. For Justice Reinhardt's historical account of suicide had created an impressive reaction from American religious organizations and individuals. This reaction resulted in a plentitude of pious amici curiae briefs to be submitted to the *Glucksberg*[905] Supreme Court.

[904] *Compassion in Dying, en banc, supra* note 805.

[905] Many briefs were equally simultaneously in the *Vacco v Quill* case; *Quill, supra* note 114; *Glucksberg*, *supra* note 114; Parker, Jr, supra note 900.

B. The *Glucksberg* and *Quill* Supreme Court Pious-Inspired Briefs

1. Methodology

Research has shown that amongst the approximately sixty Amici Curiae briefs that were presented to either, or, simultaneously to the Supreme Court *Glucksberg*[906] and *Quill*[907] debates over fifty Amici Curiae were composed of Christian groups and faith-followers.[908]

I have examined the overwhelming majority of the briefs that were submitted to the Supreme Court, and I have found that five briefs were essential for my research. Amongst these five briefs, four were against the legalization of physician-assisted suicide and one was for the legalization of the procedure.
I have selected these briefs because the commonality of these five briefs was that they all had included submissions in regards to the roles that historical

[906] *Glucksberg*, *supra* note 114.

[907] *Quill*, *supra* note 114.

[908] *Ibid; Glucksberg*, *supra* note 114; Richard E Coleson, " *The* Glucksberg & Quill *Amicus Curiae Briefs: Verbatim Arguments Opposing Assisted* Suicide" (1997) 13 Issues L & Med 3 at 3, *4, fn 5, *7 [Heinonline]; Parker, supra 900 note at 469 fn 3.

Christianity had provided in the disapproval, or acceptance of suicide and its assistance.

In the context of negating the permissibility of physician-assisted suicide, the Amici Curiae had advocated for the petitioners – the State of Washington et al. and / or the State of New York et al. – in order to uphold the bans to physician-assisted suicide, and had attempted to persuade the Supreme Court that historically Christians had never accepted the practice of suicide.

However, contrarily to the popular ideology that all Christian groups and faith-followers are against the practice of medical-assistance to dying, it appears that certain religious organizations and individuals were in favor of such a medical practice. This claim was predominately evidenced by one brief, which I found amongst the sixty briefs.

It remains that an extended study of the beliefs and submissions presented by the religious-inspired Amici Curiae, who had either supported the respondents or the petitioners in the *Glucksberg* [909] case has been essential to evidence the role that Christian-faith followers and groups have held in ensuring the accuracy of the history of Christianity's stance of suicide and its assistance in physician-assisted suicide court debates. Hereinafter are the findings.

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[909] *Glucksberg, supra* note 114.

2. The Supreme Court *Glucksberg* and *Quill* Briefs of the Christian Amici Curiae in Support of the Petitioners

Without any attribution to importance in rank, the following illustrates the Christian Amici Curiae, who had presented briefs to the Supreme Court supporting the petitioners.

The first Amicus Curiae brief was a multi-jointed document that was composed predominately of Christian groups and associations: "The United States Catholic Conference; New York Catholic Conference; Washington State Catholic Conference; Oregon Catholic Conference; California Catholic Conference; Michigan Catholic Conference; Christian Life Commission of the Southern Baptist Convention; National Association of Evangelicals; The Lutheran Church-Missouri Synod; Wisconsin Evangelical Lutheran Synod-Lutherans for Life; and The Evangelical Covenant Church; and the American Muslim Council."[910]

[910] See especially [i]n The Supreme Court of the United States, October Term, 1996, State of Washington, and Christine Gregoire, Attorney General of the State of Washington, *Petitioners*, v. Harold Glucksberg, M.D., Abigail Halperin, M.D., Thomas A. Preston, M.D., and Peter Shalit, M.D., Ph.D., *Respondents*. On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, BRIEF *AMICUS CURIAE* OF THE UNITED STATES CATHOLIC CONFERENCE, NEW YORK CATHOLIC CONFERENCE; WASHINGTON STATE CATHOLIC CONFERENCE; OREGON CATHOLIC CONFERENCE; CALIFORNIA CATHOLIC CONFERENCE; MICHIGAN CATHOLIC CONFERENCE; CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; NATIONAL ASSOCIATION OF EVANGELICALS; THE LUTHERN CHURCH-MISSOURI SYNOD; WISCINSIN EVANGELICAL LUTHERN SYNOD-LUTHERNS FOR LIFE; THE EVANGELICAL CONVENANT CHURCH; AND THE AMERICAN MUSLIM COUNCIL IN SUPPORT OF PETITIONERS STATE OF WASHINGTON, ET AL., No. 96-100, 1996 WL 650919 (U.S.) (Appellate Brief) [capitalization omitted]; *Washington v Glucksberg* 521 US 702 (1997) (Appellate Brief) [WL 650919] [Brief US Catholic Conference *et al.*].

The second brief had consisted of several Christian legal and medical professional Amici Curiae, which were the: "Christian Legal Society, Christian Medical and Dental Society, Christian Pharmacists Fellowship International, Nurses Christian Fellowship, and Fellowship of Christian Physician Assistants".[911]

Although this was not a religious group *per se* the "Southern Center for Law and Ethics"[912] in their capacity as Amicus Curiae had submitted a third brief, which is worthy of mention for their daily mission was to provide a

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[911] See especially Dennis C. VACCO, Attorney General of the State of New York, George E. PATIKI, Governor of the State of New York, Robert M. MORGENTHAU, District Attorney of New York County, Petitioners, v. Timothy QUILL, M.D., Samuel C. KLAGSBRUN, M.D., and Howard A. GROSSMAN, M.D., Respondents. STATE OF WASHINGTON, and Christine Gregoire, Attorney General of the State of Washington, Petitioners, v. Harold GLUCKSBERG, M.D., Abigail HALPERIN, M.D., Thomas A. PRESTON, M.D., and Peter SHALIT, M.D., Ph.D., Respondents. On Writ Of Certiorari To The United States Court Of Appeals For The Second And Ninth Circuits, BRIEF OF AMICI CURAIE CHRISTIAN LEGAL SOCIETY, CHRISTIAN MEDICAL AND DENTAL SOCIETY, CHRISTIAN PHARAMICISTS FELLOWSHIP INTERNATIONAL, NURSES CHRISTIAN FELLOWSHIP, AND FELLOWSHIP OF CHRISTIAN PSYCHIAN ASSISTANTS IN SUPPORT OF PETITIONERS., Nos. 95-1858, 96-110. October Term, 1996. November 12, 1996, Vacco v. Quill, 1996 WL 656337 (1996); *Vacco v Quill* 521 US 793 (1997) & *Washington v Glucksberg* 521 US 702 (1997) (Appellate Brief) [WL 656337] [Brief Christian Legal Society *et al.*]; Coleson, supra note 908.

[912] See especially State of WASHINGTON, et al. Petitioners, Harold GLUCKSBERG, M.D., COMPASSION IN DYING INC., Jane ROE, John ROE, James ROE Respondents. ON WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH CIRCUIT, ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, BRIEF FOR THE SOUTHERN CENTER FOR LAW AND ETHICS AS AMICUS CURIAE IN SUPPORT OF THE STATE OF WASHINGTON, ET AL., Nos. 96-110. October Term, 1996, November 12, 1996, WL 656302 (U.S.) (Appellate Brief) Supreme Court of the United States; *Washington v Glucksberg* 521 US 702 (1997) (Appellate Brief) [WL 656302] [Brief Southern Center].

comprehension "between law and religion", for "interested law students […] lawyers […] [and] medical students".[913]

"The Catholic Health Association of the United States"[914] had filed the fourth Supreme Court brief that remains relevant to this research.[915] Their "mission" had consisted of spreading the word of the "gospel", and of transforming "social order according to gospel norms".[916] It is paramount to note that "The Catholic Health Association of the United States" had asserted in their Supreme Court brief that **"American legal tradition", has held a consistent link "between our society's historical rejection of assisted suicide and Catholic teaching."**[917] Citing one of the first discontinuance of life-sustaining medical treatment cases, *re: Quinlan*[918], these Amicus had attempted to

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[913] *Ibid* at 3 [ellipses & word added].

[914] See especially Brief of the Catholic Health Association of the United States as Amicus Curiae in Support of Petitioners, *Vacco v Quill*, 1996 WL 656343 (1996); *Vacco v Quill* 521 US 793 (1997) (Appellate Brief) [WL 656343] [Brief Catholic Health Association].

[915] *Ibid.*

[916] *Ibid* at *1.

[917] *Ibid* at *7 [emphasis added].

[918] Karen Quinlan was a twenty-two year old woman who had stopped breathing and was rushed to the hospital. She remained in a "comatose" state and needed the use of "a respirator" in order to breath. Despite refusal by the treating physicians to cease operation of the respirator, Karen's father had pleaded with the court to have the breathing device removed. The Court of Appeal granted permission to the Father, even if death was to follow the removal. *See re: Quinlan* 355 A 2.d 647, 659-60 (NJ), cited *in* Brief Catholic Health Association, supra note 914 at *7.

persuade the Supreme Court that "Church teaching has been influential in shaping the societal views and practices which inform this Court's due process analysis."[919]

Evidence has revealed that the common objective of these four Supreme Court briefs was to provide assistance to the Supreme Court to overrule the *Compassion in Dying*[920], en banc case decision by predominately disqualifying Justice Stephen Reinhardt's repertoire on the antiquity of Christianity's tolerance of suicide.[921]

To corroborate this claim, it was noted in "*The* Glucksberg & Quill *Amicus Curiae Briefs*: *Verbatim Arguments Opposing Assisted Suicide*"[922] - which was published in Issues of Law & Medicine – a document that had surveyed the submissions of the various Supreme Court *Glucksberg* and *Quill* briefs that had advocated the bans to physician-assisted suicide that several Amici had

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[919] Brief Catholic Health Association, supra note 914 at *7.

[920] *Compassion in Dying, en banc, supra* note 805.

[921] Brief US Catholic Conference *et al.*, supra note 910 at 18, fn 11; Brief Christian Legal Society *et al.*, supra note at 912 at *23 -*28; Brief Catholic Health Association, supra note 914 at *7 -*9; Brief Southern Center, supra note 912 at *3 & s.

[922] Coleson, supra note 908.

provided submissions, which had claimed that medical assistance to "suicide" was never included in the "[h]istory and tradition of the United States".[923]

As an exemplar, some had referenced Pope John Paul II and the "Encyclical Letter *Evangelium Vitae*", noting the Pope's words that "[**t]he Church's tradition has always rejected [suicide] as a gravely evil choice**".[924] Coleson had further asserted that the religious groups as part of their strategy had protested Justice Reinhart's "self-serving and erroneous interpretations of religious views on suicide and assisted suicide".[925] Coleson had observed that a powerful message had been sent that Justice Reinhart in "[t]he Ninth Circuit's [en banc] attempt at Biblical interpretation illustrate[s] the danger of judicial interpretations of religious doctrine. [And that] [i]t is hard to 'imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible'."[926]

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[923] *Ibid* at 3.

[924] *Ibid* at 34 [emphasis added].

[925] Coleson, supra note 908 at 7.

[926] *Lee v. Weisman*, 112 S. Ct. 2649, 2671 (1992) (Souter, J., concurring), cited in Coleson, supra note 909 at 40 [words, letters added & capitalization omitted].

3. The Supreme Court *Glucksberg* and *Quill* Briefs Brief of the Christian Amici Curiae in Support of the Respondents

The final and fifth brief that I examined was presented in a singular multi-jointed document by thirty-six religious organizations, leaders and scholars in support of respondents[927] that had acted as advocators for Quill M.D. et al. & Glucksberg M.D. *et al*.[928]

I found that as proponents to the legalization of physician-assisted suicide these religious Amici Curiae had not directly referred to Justice Reinhardt and his opinion on historical Christianity and the acceptance of suicide, nonetheless it has appeared that they had concurred with the Justice Reinhardt's stance in the *Compassion in Dying* case.[929]

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[927] See especially *Dennis C. VACCO, Attorney General of the State of New York; George E. Pataki, Governor of the State of New York; and Robert M. Morgenthau, District Attorney of New York County, Petitioners, v. Timothy E. QUILL, M.D.; Samuel C. Klagsbrun, M.D.; and Howard A. Grossman M.D., Respondents. STATE of Washington and Christine O. Gregoire, Attorney General of Washington, Petitioners, v. Harold Glucksberg, M.D. Abigail Halperin, M.D., Thomas A. Preston, M.D. and Peter Shalit, M.D., Ph.D., Respondents,* Nos. 95-1858, 96-110. October Term, 1996. Dec 10, 1996. On Writs of Certiorari to the United States Courts of Appeals for the Second and Ninth Circuits, BRIEF OF 36 RELIGIOUS ORGANIZATIONS, LEADERS AND SCHOLARS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS, 1996 WL 711178 (U.S.) (Appellate Brief) United States Supreme Court Amicus Brief; *Vacco v Quill* 521 US 793 (1997) & *Washington v Glucksberg* 521 US 702 (1997) (Appellate Brief) [Brief 36 Religious Organizations *et al.* for Respondents] [WL 711178].

[928] *Ibid.*

[929] *Ibid; Compassion in dying, en banc, supra* note 805.

It remains beneficial for this dissertation to demonstrate the Christian beliefs of some of these thirty-six pious groups in regards to the legalization of physician-assisted suicide.

The brief, at appendix *2a[930], has revealed that:

> THE CATHAR CHURCH […] is **Evangelical in basic doctrine** and is in many respects similar to the Amish, Brethren, and Mennonite families of churches. Throughout its long history, the Cathar Church has taught that people desiring to end their suffering by hastening death are entitled to dignity, sympathy, and support, and that their decision is a matter of individual conscience to be judged only by God. **The Cathar Church believes that medical practitioners should be able to provide aid in dying**, subject to guidelines to guard against abuse, and thus **supports a constitutionally protected right to physician-assisted suicide**.[931]

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[930] Brief 36 Religious Organizations *et al.* for Respondents, supra note 928 at appendix *2.

[931] *Ibid* at (emphasis & ellipsis added).

Whilst, a second group presented themselves as:

> THE EPISCOPAL DIOCESE OF NEWARK [that] is one of the largest Episcopal dioceses in the United States […] [t]he Diocese believes that choices about death are matters of individual conscience informed by scripture, tradition, and reason. Accordingly, the **Diocese has resolved that suicide may be a morally appropriate choice for Christians who are suffering from a terminal illness characterized by persistent and irremediable suffering and who voluntarily make an informed decision to hasten death**. The Diocese has further resolved that assisting another in accomplishing voluntary death under these circumstances may be an equally moral choice.[932]

The beliefs of these two aforementioned Christian groups, in conjunction with the pious ideologies of the other religious groups and faith-followers that were

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[932] *Ibid.*

found in the same Supreme Court brief have appeared to have formed the core of the "statements of interests of the Amici Curiae".[933]

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[933] A non-exhaustive list of the Amici Curiae, who supported the respondents, along with several of their individual "STATEMENTS OF INTERESTS OF THE *AMICI CURAIE*" are as follows:

"AMERICANS FOR RELIGIOUS LIBERTY is a nonprofit public interest educational organization dedicated to defending religious liberty, freedom of conscience, and the constitutional principle of separation of church and state."

"Americans for Religious Liberty has participated as an *amicus* in other cases in this Court that have implicated these concerns. Americans for Religious Liberty believes that bans on physician-assisted suicide conflict with fundamental First Amendment guarantees."

"THE AMERICAN HUMANIST ASSOCIATION, founded in 1941, has members and local affiliates throughout the United States. The Association has adopted a formal statement on physician-assisted suicide that recognizes an individual's right to exercise control over the manner and time of dying subject to adequate safeguards assuring that such actions are wholly voluntary and clinically appropriate. Consonant with the principles of autonomy, dignity, and freedom of conscience underlying the First and Fourteenth Amendments, the Association believes that the right to hasten death with the aid of a physician should be protected by this Court."

"THE BOARD OF DIRECTORS OF THE SOCIETY FOR HUMANISTIC JUDAISM oversees an organization that reflects the beliefs of approximately one-fifth of the world's Jewish population, and is dedicated to the promotion of Jewish and humanistic ideals, including human dignity, integrity, tolerance, and equal treatment. In view of its respect for the autonomy and dignity of the individual and its compassion for those who are suffering, the Board of Directors believes that a terminally ill person's decision to end his or her suffering should be honored. The Board of Directors thus affirms that competent adults should have the right to make responsible decisions regarding the most profound and private aspects of their own lives-including the choice to hasten death in the face of terminal illness-free from government interference and subject to regulation only to the extent necessary to provide appropriate safeguards."

"THE CONGRESS OF SECULAR JEWISH ORGANIZATIONS is composed of several independent organizations that seek to forge a Jewish identity that is grounded in contemporary life and is committed to the social values of justice, peace, and community responsibility. Consistent with this purpose, the Congress has taken the position that a competent, terminally ill adult who is gripped by unbearable suffering should have the right to assistance in dying, subject to adequate safeguards that ensure that the decision is informed, rational, and voluntary."

"THE UNITARIAN UNIVERSALIST ASSOCIATION is a religious association of more than 1,000 congregations in the United States and Canada. In 1988, the Association adopted a resolution affirming the right to self-determination in dying and supporting the elimination of civil and criminal penalties against those who, under proper safeguards, assist terminally ill patients in selecting the time and manner of their own deaths."

"DOCTOR ROBERT S. ALLEY, Emeritus Professor of Humanities, University of Richmond, THE REVEREND JOHN R. BROOKE of Belmont, California (United Church of Christ), THE

The objective of the these thirty-six pious groups was to share with the Supreme Court:

> [T]hat all Americans of all faiths [were] free to

REVEREND DOCTOR ROBERT McAFEE BROWN (Presbyterian), Emeritus Professor of Theology and Ethics, Pacific School of Religion, RABBI DENISE L. EGER of West Hollywood, California (Reform Judaism), THE REVEREND DOCTOR LAWRENCE FALKOWSKI of West Orange, New Jersey (Episcopalian), THE REVEREND DUANE HENRY FICKEISEN of Palo Alto, California (Unitarian Universalist),"

"THE REVEREND FRANK A. HALL of Westport, Connecticut (Unitarian Universalist), THE REVEREND GLEN A. HOLMAN of Sacramento, California (Christian Church (Disciples of Christ)), DOCTOR GERALD LARUE, Emeritus Professor of Religion, Adjunct Professor of Gerontology, University of Southern California, DOCTOR DANIEL C. MAGUIRE, Professor of Theology, Marquette University, BISHOP CALVIN D. McCONNELL (retired) of Lake Osweto,"

"Oregon (United Methodist), THE REVEREND ROBERT H. MENEILLY of Prairie Village, Kansas (Presbyterian), THE REVEREND DOCTOR RALPH M. MERO, JR. of Harvard, Massachusetts (Unitarian Universalist), THE REVEREND DOCTOR DONALD S. MILLER of San Mateo, California (Episcopalian),"

"THE REVEREND GALE DAVIS MORRIS of Milwaukee, Wisconsin (Episcopalian), THE REVEREND DOUGLAS I. NORRIS of Merced, California (United Methodist),"

"THE REVEREND BRUCE G. PARKER (retired) of Gig Harbor, Washington (United Methodist), THE REVEREND C. WILLIAM PEARSON of Southfield, Michigan (Evangelical Lutheran in America), THE REVEREND DAVID A. PETTEE of Berkeley, California (Unitarian Universalist), THE REVEREND DOCTOR KENNETH W. PHIFER of Ann Arbor, Michigan (Unitarian Universalist), THE REVEREND HERBERT F. SCHMIDT of Palo Alto, California (Lutheran), THE REVEREND ANDREW SHORT of Austin, Texas (Presbyterian), THE REVEREND DOCTOR PAUL D. SIMMONS (Baptist), Director, Center for Ethics, Adjunct Professor, Medical Ethics, University of Louisville and Louisville Presbyterian

Seminary, THE REVEREND DEBORAH STREETER of Carmel California (United Church of Christ), THE REVEREND DOCTOR JOHN SWOMLEY, Emeritus Professor of Christian Ethics, St. Paul School of Theology, THE REVEREND JUDITH CLYMER WELLES of Palo Alto, California (Unitarian Universalist), THE REVEREND DOCTOR RAY L. WELLES of Boulder Creek, California (United Church of Christ), DOCTOR RICHARD WESTLEY, Professor of Philosophy, Loyola University, Chicago."

See Brief 36 Religious Organizations *et al.* for Respondents, supra note 927 at 1*A* APPENDIX at 13-15.

make decisions about the time, place, and manner of death that reflect[ed] their personal understanding of life's meaning, reduce the suffering of their bodies and minds and conform to their ethical and spiritual values."[934]

[934] *Ibid* at *1 [word, letters & capitalization added].

C. The Amici Curiae's Scrutiny of Justice Reinhardt's Analysis of the History of Christians and Suicide

Justice Reinhardt's examination of the "Historical Attitudes Toward Suicide", in the *Compassion in Dying*[935]*, en banc* case, had debuted with the Justice advising the court that unlike the Court of Appeal that had claimed that "a constitutional right to aid in killing oneself" was "unknown to the past",[936] the *en banc* court asserted that "our inquiry is not so narrow. Nor is our conclusion so facile. The relevant historical record is far more checkered than the majority would have us believe."[937]

As discussed in this thesis, evidence that has supported the Justice's claim has consisted of an analysis of the historical practice of suicide that had included a study on the early Christian stance to suicide, composed of studies pertaining to: the forbearance of suicides of various Biblical characters, a non-conventional repertoire of the resemblance of martyrdoms and suicide, along with St. Augustine's later ban to suicide.[938]

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[935] *Compassion in Dying v. Washington*, *en banc, supra* note 805.

[936] *Compassion in Dying* appeal, *supra* note 832 cited in *Compassion in Dying, en banc, supra* note 805 at para 63.

[937] *Ibid.*

[938] *Compassion in Dying, en banc, supra* note 805 at paras 76 - 78.

In the Christian Amici Curiae's role to ensure the accuracy of the history of Christianity's stance of suicide and its assistance in the physician-assisted suicide in the Supreme Court debate several Amici had submitted to the Supreme Court the argument that in Justice Reinhardt's attempt to establish "a traditional foundation for a right to assisted suicide", that the majority of the *Compassion*[939] *en banc* court had "presented its own view of the relevant history, including the suggestion that early Christians accepted suicide."[940] Thus, the religious groups held that the Nine Circuit's repertoire was flawed,[941] and that "no recognized historian has documented instances of early Christian church leaders condoning suicide […] they uniformly condemned self murder."[942]

It is essential to take notice that the Amici addressed in this segment had appeared to hold a conventional Christian interpretation of suicide and its assistance. One that quit possibly had enforced the "Christian belief" that only

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[939] *Compassion in Dying, en banc, supra* note 805.

[940] *Ibid;* Brief Christian Legal Society *et al.* cited in Coleson, supra note 908 at 37.

[941] Brief Christian Legal Society *et al.* cited in Coleson, 909 supra note 909 at 37.

[942] To substantiate their stance, they essentially cited two publications: the first from Robert Barry, "The Development of the Roman Catholic Teachings on Suicide" (1995) 6 Notre Dame JL Ethics & Pub Pol'y 466-468 and the second from Amundsen, "The Significance of Inaccurate History in Legal Considerations of Physician-Assisted Suicide, in Physician-Assisted Suicide: Ethics, Medical Practice, and Public Policy" (1997) RF Weir ed. cited in Coleson, supra note 909 at 37 [ellipsis added].

"God may choose the time and manner of one's death",[943] and not an individual human, as Justice Reinhardt had concluded in the *Compassionate in Dying, en banc* decision.[944]

1. The Death of Notable Biblical Characters

A study of Justice Reinhardt's opinion that early Christianity was accepting of the practice of suicide has first revealed the following observation, which was previously presented:

> The **early Christians saw death as an escape from the tribulations of a fallen existence and as the doorway to heaven**. "In other words, the more powerfully the Church instilled the idea that this world was a vale of tears and sins and temptation, where they waited uneasily until death released them into eternal glory, the more irresistible the temptation to suicide became".[945]

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[943] Jennifer Cole Popick, "A Time to Die?: Deciding the Legality of Physician-Assisted Suicide" (1997) 24:4 Pepp L Rev 1327 at 1328.

[944] *Ibid; Compassion in Dying, en banc, supra* note 805.

[945] *Ibid* at para 76.

This paragraph further alluded to footnote number 25 of the case, where Justice Reinhart had referred to the "Old Testament" and to the "suicides" of: "Samson, Saul, Abimlech, and Achitophel".[946] The same footnote also had also referenced the suicide of "Judas Iscariot" as found in the "New Testament".[947] The Justice had commented that neither one of these religious characters had been condemned for having committed self-murder.[948]

There appears to have been two responses to Justice Reinhardt's stance of the suicides of the relevant Biblical characters; one that had adopted a traditional interpretation of the Holy Scriptures and as a result had disapproved of the Justice's rationalization.[949] Whilst, the other interpretation had consisted of a less conventional perspective towards the deaths that had occurred according to the Bible and as a result had concurred within the Justice's opinion.

In regards to the first position, research into a Supreme Court *Glucksberg*[950] and *Quill*[951] brief, from the Christian Amici Curiae - in support of the

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[946] *Ibid* at para 76, fn 25.

[947] *Ibid* at fn 25.

[948] *Ibid* at fn 25.

[949] See e.g. Parker, super 900 at 477 fn 44.

[950] *Glucksberg, super* note 114.

Petitioners - who were composed of legal and medical professionals showed that Justice Reinhardt's recall of the alleged suicides that had occurred in the Bible were inaccurate: "[t]here simply [was] no Biblical acceptance of suicide".[952] These Amici Curiae had also argued that historically the "Church" had never been accepting of the practice of "suicide".[953]

As it was pointed out by Coleson explaining this claim:

> The early orthodox Christian church issued few official moral condemnations of suicide, or any action for that matter, even though the great proportions of early Christian writers condemned deliberate self-killing vicariously. **The lack of "official" condemnations of suicide, however, does not mean that the early Church endorsed or permitted it.** The early Church produced many theological and moral writings against suicide, and these views later came to be expressed in councilor and

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[951] *Quill, super* note 114.

[952] Brief Christian Legal Society *et al.,* super note 911 at 32, 38 [letters added & capitalization omitted]; *Glucksberg, super* note 114; *Quill, super* note 114.

[953] Brief Christian Legal Society *et al.,* super note 911 at 36.

> juridical documents after Constantine granted legal status to the Church.[954]

Even though the "Bible" had lacked an explicit condemnation of self-murder, in accordance to: an implied moral and ethically-based "Scripture", the "early church history", and "patristic theology", there existed a negation of the acceptance of self-murder and its assistance.[955] These pious traditions and writings were not to be misrepresented in order to substantiate the "legalization of physician-assisted suicide".[956] Thus, the practice of "suicide and assisted suicide" remained antagonistic to numerous "biblical teachings".[957]

A review of the second school of thought has revealed a less traditional interpretation of the Biblical suicides. In a Supreme Court brief, which had favored the Respondents, the pious Amici Curiae - who had supported Justice Reinhardt and the legalization of physician assistance to suicide - had agreed with the Justice that the "Bible" contained five suicides in accordance to the Biblical passages: "I Samuel 31, II Samuel 17, 1 Kings 16, and Matthew

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[954] *Ibid* [emphasis added].

[955] O'Mathúna and Amundsen, super note 860 at 478 - 480, 496.

[956] *Ibid* at 496.

[957] *Ibid.*

27".[958] The Amici had asserted that nowhere in the "Old Testament" was there an overt or an "implied" discernment regarding "suicide", nor did the "New Testament" condemn the act of "suicide".[959]

To sustain their arguments, the Amici had referred to *Playing God: Fifty Religions' Views on Your Right to Die*[960], and had quoted Reverend Sallierae Henderson, who had asserted that the "Bible" contained no apparent censure of the said Biblical deaths, and also that throughout the Holy Scriptures there was "no moral judgment implied" regarding said deaths that had occurred.[961] Such had been merely "reported" in the Bible.[962]

It remains beneficially to address a few of the deaths that had transpired in the Bible in order to demonstrate the interpretation provided by Justice Reinhardt in his *Compassion in Dying*[963] *en banc* opinion, along with the differing Christian Amici's verification of the Justice's accuracy.

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[958] Brief 36 Religious Organizations *et al.* for Respondents, supra note 927 at 10.

[959] *Ibid* at 10; Parker, super note 900 at 477 fn 44.

[960] G. Larue, *Playing God: Fifty Religions' View on Your Right to Die* (Wakefield, RI: Moyer Bell, 1996) at 420-422 (quoting Rev. Sallierae Henderson) cited in Brief 36 Religious Organizations *et al.* for Respondents, supra note 927 at 10.

[961] *Ibid.*

[962] *Ibid.*

[963] *Compassion in Dying v Washington*, *supra* note 805.

a. The New Testament

i. The Deaths of Judas and Jesus

In the *Compassion in Dying*[964] *en banc* decision at footnote 25 Justice Reinhardt had made reference to "the suicide of Judas Iscariot" that had transpired in the "New Testament".[965]

A brief recall of Judas death reveals that in the Bible, Judas is referred to as being one of Jesus' apostles, who had hung "himself after betraying [Jesus] Christ".[966]

In Reinhardt's analysis of the history of Christianity, with regards to suicide the Justice was of the opinion that Judas' self-murder did not qualify as a "sin", but was rather perceived "as an act of repentance".[967]

By contrast, research has revealed that many Christian Amici Curiae were in

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[964] *Ibid.*

[965] *Ibid* at fn 25.

[966] Coleson, supra note 908 at 39 [words added].

[967] *Compassion in Dying v Washington*, *supra* note 805 at 37.

contradiction with Justice Reinhardt stance on Judas' suicide.[968] The Amici's fundamental position was that, "[t]he Ninth Circuit's assessment of Christian tradition [was] certainly mistaken".[969] Amongst several exemplars to evidence their claim, at footnote 11 of their brief they had submitted the argument that according to "Christian tradition" Judas's suicide had occurred out of desperation and that it was "not an act of repentance".[970]

Additional legal documentation that had quite possibly opposed Justice Reinhardt's opinion, and that had supported the claim that the death of Judas was a violation of Christian teachings and principles was further submitted to the Supreme Court in a brief presented by "The Southern Center for Law and Ethics".[971]

The Amicus Curiae, who had advocated for the State of Washington had contended that "[s]uicide is rarely mentioned in the New Testament. The only suicide recorded there is that of Judas (**hardly a model of Christian virtue**),

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[968] Brief US Catholic Conference *et al.*, supra note 910.

[969] *Ibid* at 18 [word added].

[970] *Ibid* at 18 fn 11; Coleson, supra note 909 at 34.

[971] Brief Southern Center, supra note 912 at 5.

and his self-destruction is reported without comment (Mt. 25:5[sic]; Acts 1: 18)."[972]

Paradoxically, an extended study of the same aforementioned Supreme Court brief has also revealed that the New Testament equally contained an incidental form of self-murder.[973] The Southern Center for Law and Ethics' Amicus had contended in their brief that in the New Testament "[s]uicide arises incidentally" in additional passages of the New Testament, noting; "[w]hen Jesus said, 'Where I go, you cannot come', this made the Jews ask, 'Will he

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[972] *Ibid* (emphasis added); This claim has been corroborated in, "Historical and Biblical References in Physician-Assisted Suicide Court Opinions", where the authors were of the opinion that Judas' "**[s]elf-destructive behavior" was never to be imitated by Christians** for Judas was perceived to be demonically possessed. See O'Mathúna and Amundsen, supra note 860 at 487.

The Southern Center for Law and Ethics had referred to Mt 25:5, it is quit possible that they meant to refer to Mt 27:5:

> Then he threw down the pieces of silver in the temple
> and departed, and went to hanged himself.

Acts 1: 18 is read as follows:

> Now this man purchased a field with the wages of iniquity;
> and falling headlong he burst open in the middle and all his
> entrails gushed out."

See KJV Bible, supra note 416 *sub verbo* "Mt 27:5", "Acts 1: 18".

[973] Brief Southern Center, super note 912 at 5.

kill himself?' (Jn. 8:21-22)."[974] The relevant passages of the New Testament, John 8:21–22, are read as follows:

> Then said Jesus again unto them, I go my way, and ye shall seek me, and shall die in your sins: whither I go, ye cannot come. Then said the Jews, Will he kill himself? Because he saith, Whither I go, ye cannot come.[975]

In further exploring the history of Christianity and the death of Jesus in physician-assisted-suicide judiciary debates it has been observed that unlike Justice Kaufman, who in the *People v. Kevorkian*[976] opinion had referenced that "[i]n the first years of the Church, suicide was such a neutral subject that even the death of Jesus was regarded by Tertullian, one of the most fiery of early Fathers, as a kind of suicide",[977] Justice Reinhardt, in the *Compassionate*

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[974] *Ibid.*

[975] See KJV Bible, supra note 416 *sub verbo* "John 8:21-22".

[976] *Kevorkian*, *super* note 871.

[977] *Ibid* at *11.

It is paramount to note that Darrel Amundsen – a contributor of several articles throughout this doctorate - in his article, "Did the Early Christians "Lust After Death? A New Wrinkle in the Doctor-Assisted Suicide", which discusses suicide and the claim that "theological and historical ignorance" of the subject matter had resulted in rendering flawed conclusions in physician-assisted court debates; with an emphasis placed upon Justice Kaufman. A reading of the article, has observed the authors' profess that Justice Kaufman was not a "historian" and in

in Dying[978] case had not mentioned the death of Jesus, in his examination of suicides that had occurred in the New Testament in order to provide evidence that early Christianity had been accepting of the practice of suicide.[979]

The aforementioned observation served to demonstrate that even though there was a remarkable resemblance between Justice Kaufman and Justice Reinhardt in the use of the history of Christianity to aid in the contemporary acceptance of assisted suicide there still remained vital distinctions in their analysis.

b. The Old Testament

i. The Death of Saul

A further study of the *Compassion in Dying, en banc* case has additionally revealed that at footnote 25, Justice Reinhardt's was of the perception that in the "Old Testament", "Saul" had committed "suicide" and that his self-murder was not "worthy of censure".[980]

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advancing the Fourteenth Amendment's liberty "right-to-die" claim, the Justice's historical analysis was inaccurate. See Darrel W. Amundsen & Joni Eareckson Tada, "Did the Early Christians "Lust After Death? A New Wrinkle in the Doctor-Assisted Suicide" online: CRI < http://www.equip.org >.

[978] *Kevorkian*, *super* note 871; *Compassion in Dying v Washington*, *en banc, supra* note 805.

[979] *Ibid; Kevorkian*, *super* note 871; Amundsen & Eareckson, supra note 977.

[980] *Compassion in Dying v Washington*, *en banc, supra* note 805 at fn 25.

Christian groups, composed of the New York Catholic Conference, the Washington State Catholic Conference, *et al*., which had advocated the bans to physician-assisted suicide, had asserted in their *Glucksberg* briefs that the only time "assisted suicide" had occurred in the "Old Testament" was with the death of Saul, but unlike Justice Reinhardt's opinion, **Saul's "assisted suicide" was "treated as a capital crime**".[981]

In accordance to a second Supreme Court brief, which was presented by various Christian legal and medical professionals, **Saul's "assisted suicide was not met with approval**, at least by King David."[982] The religious Amici Curiae had further added that there was evidence that King David had not approved of Saul's assistance to self-murder because the King "had the Amalekite killed for his killing of Saul".[983]

According to these Amici the Old Testament had evidenced this claim in the Scriptures noting, 2 Samuel 1:15-16:[984] These relevant passages of the Bible are read as follows:

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[981] Brief US Catholic Conference *et al.* supra note 910 at 18 fn 11 (emphasis added); Coleson, supra note 908 at 34.

[982] *Ibid* at 39; Brief Christian Legal Society *et al.*, super note 911 at *27 (emphasis added).

[983] *Ibid* at *27; Coleson, supra note 908 at 39.

> And David called one of the young men, and said, Go near, [and] fall upon him. And he smote him that he died. And David said unto him, The blood [be] upon thy head; for thy mouth hath testified against thee, saying, I have slained the LORD's anointed.[985]

Of particular importance to this thesis is also the study of, 2 Samuel 1:9-10, of the Bible, which reads as follows:

> He said unto me again, **Stand, I pray thee, upon me, and Slay me: for anguish is come upon me, because my life [is] yet whole in me. So I stood upon him, and slew him, because I was sure that he could not live after that he was fallen**: and I took his crown that [was] upon his head, and the brace let that [was] on his arm, and have brought them hinder unto my lord. [986]

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[984] Brief US Catholic Conference *et al.* supra note 910 at 18 fn 11; Brief Christian Legal Society *et al.*, super note 911 at *27.

[985] KJV Bible, supra note 416, *sub verbo* 2 Samuel 1:15-16.

[986] See especially KJV Bible, supra note 416, *sub verbo* 2 Samuel 1:9-10 [emphasis added]; Brief Christian Legal Society *et al.,* supra note 911 at *27; Coleson, 908 super note at 39.

This request to assistance to suicide came after Saul had tried to end his life "by falling on his sword, after losing God's favor and losing in battle".[987] The "fall on his sword" had caused him to remain "in the throes of death".[988] Thus, the contemporary reading of, 2 Samuel 1:10-11, conveys that to end his agony, Saul had pleaded with "an Amalekite solider to kill him" and that the soldier "stood over him and killed him, because [the soldier] was sure that [Saul] could not live after he had fallen".[989]

In accordance to the religious Amici the aforementioned Biblical passages had evidenced the condemnation to physician-assistance to suicide through a historically exemplar, which had revealed that Saul had consented to partake in "assisted suicide", but that the act was sanctioned as an unfavorable "capital crime".[990]

It remains that the religious groups in their Supreme Court briefs had perhaps shunned another possible interpretation of the referenced Biblical passages that quit possibly would had demonstrated Saul's assistance to suicide as an act that

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[987] *Ibid;* Brief Christian Legal Society *et al.,* supra note at 911 at *27.

[988] *Ibid;* Coleson, 908 super note at 39.

[989] *Ibid;* Brief Christian Legal Society *et al*, supra note 911 at *27 [words added].

[990] Coleson, 908 super note at 34; Brief US Catholic Conference *et al.*, supra note 910 at 18 fn 11; Brief Christian Legal Society *et al*, supra note 911 *27.

was to be pardoned as opposed to being condemned.[991] For an extended study into the Saul's death has revealed that a different stance of Saul's suicide has also existed.[992]

Former Justice of the law, Amnon Carmi, and Professor from the Faculty of Law of the University of Haifa and Director for The International Center for Health Law and Ethics for the same academic institution, who also allegedly holds some of the follows positions, President of the World Association for Medical Law and Editor-in-Chief for Medicine and Law: International journal and for the International Medicolegal Library, had edited a publication entitled, *Euthanasia.*[993]

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[991] Even though this segment of the dissertation is written under the postulation of the roles of Christianity in ensuring that accuracy of historical Christianity and suicide in physician-assistance to suicides court debates given that the death of Saul is located in the Old Testament, I believed that it was *à propos* to verify the opinion of Jewish scholars. For not only has "Christianity developed from a Jewish sect", but it remains that the Old Testament has been an influence in the context of the Christian-based arguments in physician-assisted suicide discourses; David. C. Thomasma, "Assisted Death and Martyrdom" (1998) 4:2 Christian Bioethics 122 at 127, Christian Bioethics, Oxford Academics
< http://www.academic.oup.com >.

[992] *Ibid;* An extended study into the Saul's death has revealed that a different interpretation of Saul's suicide has also existed. Even though this segment of the dissertation is written under the postulation of the roles of Christianity in ensuring that accuracy of historical Christianity and suicide in physician-assistance to suicides court debates, given that the death of Saul is located in the Old Testament, I believed that it was apropos to verify the opinion of Jewish scholars. For not only has "Christianity developed from a Jewish sect", but it remains that the Old Testament has been an influence in the context of the Christian-based arguments in physician-assisted suicide discourses.

[993] Carmi, supra note 987; Professor Amnon Carmi, online: Faculty of Law University of Haifa, Law in Changing World,
<http://weblaw.haifa.ac.il/en/Faculty/Carmi/pages/default.aspx >.

The book contained a chapter by Carmi, entitled, "Live Like a King, Die Like a King", which had questioned whether the seriousness of killing an individual is reduced when "suicide and euthanasia" are performed.[994] The chapter is written in accordance to "Jewish Law and with respect to general human conceptions".[995] According to Professor Carmi, there are exceptions, when a suicide will not be deemed unlawful, such as in the case with King Saul's death.[996]

Carmi had demonstrated that King Saul's death had prompted "two accounts" depending on whether one is a follower of King Saul, or of King David.[997] The interpretation via "the first book of Samuel (31:4) reads as follow;

> Then said Saul unto his armour-bearer, draw the sword, and thrust me through therewith, lest

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[994] Carmi, supra note 987 at para. 1.1.3. The rest of first book of Samuel (31:4) is read as follows:

> But his armourbearor would not: for he was sore afraid.
> Therefore Saul took a sword, and fell upon it.

See KJV, supra note 416 *sub verbo* first book of Samuel (31:4).

[995] *Ibid.*

[996] *Ibid* at para 1.2.2

[997] *Ibid.*

> these uncircumcised come and thrust me through and abuse."[998]

Camri had noted that "sages of Israel" were of the opinion that when adhering to this position, King Saul's suicide was held to be "lawful" and not seen as being sinful, but "as an act of martyrdom", for it avoided him from being captured, being subject to abuse and possible proselytize by the "Philistines" and the enduring "apoplexy".[999]

It is paramount to note that this rabbinical version of the suicide of Saul was reiterated in the context of contemporary physician-assisted suicide. The following will provide three exemplars.

Firstly, David C. Thomasma had referenced in, "Assisted Death and Martyrdom"[1000], that under "Rabbinical teaching" "Saul's suicide" was licit, or at the very least pardonable.[1001] It is pertinent to take notice that Thomasma's

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[998] *Ibid.*

[999] *Ibid.*

[1000] Thomasma, supra note 991.

[1001] *Ibid* at 129.

article was published in the peer-review journal, Christian Bioethics,[1002] a journal, whose applies a "non-ecumenical approach to Christian bioethics", while remaining "within the framework of traditional Christian moral commitments" in order to study modern bioethics and "health care" policies including "euthanasia".[1003]

Secondly, in a chapter entitled, "Jewish Deliberations on Suicide: *Exception, Toleration, and Assistance*"[1004], which was inserted in Margaret Pabst Battin's book, *Physician Assisted Suicide: Expanding the Debate*[1005], the author Noam J. Zohar had claimed that Saul's suicide was similar to the martyrdom paradigm, because Saul had feared the "physical suffering" and "apostasy" linked with torture.[1006] Zohar had suggested that in the "context of illness" this

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[1002] Supra note 991.

[1003] *Ibid.*

[1004] Noam J. Zohar, "Jewish Deliberations on Suicide: *Exception, Toleration, and Assistance*" 362 cited in Battin, supra note 517.

[1005] *Ibid*.

Ms. Battin, is a Distinguished Professor at the department of Philosophy at the University of Utah, and an Adjunct Professor for the University in Internal Medicine, and author of publications advocating medical-assistance to dying. See Margaret P Battin, online: The University of Utah < http://www.faculty.utah.edu >.

[1006] Zohar, supra note 1004 at 367; Thomasma, supra note 991 at 129.

justification may provide "a legitimation of suicide where a person feared that his or her suffering might lead to blasphemy".[1007]

Thirdly, in, "The Ninth Circuit Court's Treatment of the History of Suicide By Ancient Jews and Christians in Compassion in Dying v. State of Washington: Historical Naivete or Special Pleading?"[1008], Dr. Darrel Amundsen had cited the work of Professor Carmi, and the suggestion that the death of Saul could have been considered to be a "martyrdom" by referring to a quote that "God himself killed Saul either directly by Saul's own hand or by the Amalekite who killed Saul at the latter's request".[1009]

Subject to Judeo-Christian teachings, it remains that in the *Glucksberg*[1010] and *Quill*[1011] briefs the pious Amici Curiae had presented their historically pious arguments to prohibit the assistance to suicide only with reference to the second position, 2 Samuel 1:9 *et s.* of the Old Testament, and had forgone the

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[1007] Zohar, supra note 1004 at 367.

[1008] Amundsen, supra note 836.

[1009] *Ibid* at 378; Carmi, surpa note 987.

[1010] *Glucksberg, supra* note 114.

[1011] *Quill, supra* note 114.

first interpretation that Saul's suicide was an acceptable and a non-punishable act, via, 1 Samuel 31:4; fundamentally perceived as a form of martyrdom.[1012] Despite these dichotomies, it was claimed that the "**suicides" that were presented in the Holy Bible were to viewed as "honorable" acts, and were not to be perceived as analogical "support for medical euthanasia or physician-assisted suicide**, because they [did] not involve situations similar to those faced by terminally or seriously ill patients".[1013]

Perhaps one may further question, whether there exists correlated explanations, between the notion of suicide, historical martyrs and contemporary physician-assisted suicide, in dignified death court debates.

2. Christian Martyrdoms

a. Suicide-Based Martyrs

Throughout this paper the *Compassion in Dying*[1014]*, en banc* decision has demonstrated that fundamentally Justice Reinhardt had attempted to convey the

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[1012] Brief US Catholic Conference et al, supra note 910; Brief Christian Legal Society *et al*., supra note 911; Coleson, supra note 908 at 34, 39; Carmi, supra note 987 at para. 1.2.2; KJV Bible, supra note 416.

[1013] Amundsen, supra note 836 at 376 [words and emphasis added].

[1014] *Compassion in Dying, en banc, supra* note 805.

message that historically Christians offered self-evidence of permissible suicide, and quit possibly of assisted suicide.[1015]

Another relevant exemplar in support of this claim has shown that the Justice had referred to the practice of Christian Martyrs, who had knowingly agreed to a form of assistance to suicide in order to die for their religious convictions.[1016] Justice Reinhardt's analysis had included an opinion that;

> **[E]arly Christians" had perceived end-of-life as eluding from the difficulties of life and as a pathway towards "heaven", had lead the Justice to further contend that this ideology had promoted suicide-based martyrdoms**.[1017]

The Justice had specified that "[t]he Christian impulse to martyrdom reached its height with the Donatists, who were so eager to enter into martyrdom that

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[1015] *Ibid* at paras 76, 77, 78,

[1016] *Ibid* at paras 76, 77, 78.

The Justice had referred to Jews, who had equally practiced a form of martyrdom. See *Compassion in Dying v. Washington*, *en banc,* supra note 805 at fn 24.

[1017] *Ibid* at para 76 [emphasis & capitalization added].

they were eventually declared heretics".[1018] This Christian belief - with an emphasis placed on Donatism - had given rise to a plentitude of martyrdoms.[1019]

To support his opinion, Reinhardt, in his analysis of "[h]isotrical [a]ttitudes [t]owards suicide"[1020] had made reference to *The History of the Decline and Fall of the Roman Empire*[1021] where the Justice had observed that the author – historian Edward Gibbons - had explained that the **Donatists' martyrs "sometimes forced their way into courts of justice and compelled the affrighted judge to give orders for their execution"**.[1022] It was further noted that "[t]hey frequently stopped travellers on the public highways and obliged them to inflict the stroke of martyrdom by promise of a reward, if they consented--and by the threat of instant death, if they refused to grant so singular a favour."[1023]

[1018] *Ibid* at para 76 [capitalization omitted].

[1019] *Ibid* at para 76.

[1020] *Ibid* at para 63.

[1021] Edward Gibbons, *The History of the Decline and Fall of the Roman Empire*, vol1 (Oliphant Smeaton ed.) cited in *Compassion in Dying v. Washington*, *en banc,* supra note 805 at para 76.

[1022] *Ibid* at para 77 (emphasis added).

[1023] *Ibid* at para 77.

Also, in asserting that in Christian antiquity there had appeared to be a connection between the practices of suicide and martyrdom, Justice Reinhardt had referenced, Thomas Marzen *et al*., "Suicide: A Constitutional Right?"[1024], and had quoted the authors' claim that '**there were many examples of Christian martyrs whose deaths bordered on suicide**'."[1025] Justice Reinhardt had further asserted that "[e]ven stauch opponents of a constitutional right to suicide acknowledge that".[1026]

Research has revealed that Justice Reinhardt's examination of Christian martyrdoms had created approval and controversy amongst various Christian organizations and faith-following individuals, which had brought forth evidence to the Supreme Court's physician-assisted suicide debate to either challenge the inaccuracy, or support the correctness of Justice Reinhardt's analysis of the antiquity of Christianity martyrdom and suicide. Studies have shown that pertinent arguments were based upon the notions of the intention to die, the voluntariness to commit suicide or to participate in assistance to dying, and the imitation of the Jesus's death. The following paragraphs shall present these finding.

[1024] Thomas J. Marzen, Mary K. O'Dowd, Daniel Crone *et al.,* "Suicide: A Constitutional Right?" 24 Duq L Rev (1985-1986) at 26 cited in *Compassion in Dying v. Washington*, *supra* note 805 at para 78.

[1025] *Ibid* (emphasis added).

[1026] *Compassion in Dying, en banc, supra* note 805 at para 78.

An examination of the pious-inspired brief that was submitted by "36 Religious Organizations, Leaders and Scholars as Amici Curiae in Support of Respondents"[1027] to the Highest Court of the land has shown that these religious Amici Curiae had concurred with Justice Reinhardt's opinion about early Christian martyrdom and its correlation with suicide.[1028] This was evidenced on page 11 of their brief, with the following submission:

> Indeed, given that martyrdom at the hands of infidels was an especially prized end, "fanatical Christians" – in particular, a sect known as the Circumcelliones – would **invite their own death** by "taunt[ing] their Roman persecutors into acts of violence."[1029]

To collaborate their claim these Amici had provided the following argument:

> Among early Christians, in fact, suicide was not particularly unusual. Because "the supreme duty in this life was to avoid the sin which would

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[1027] Brief 36 Religious Organizations *et al.*, supra note 927.

[1028] *Ibid.*

[1029] *Ibid* at 11 [emphasis added].

> result in eternal damnation," the **early Christians considered it permissible to commit suicide** rather than risk condemnation.[1030]

Further inquiry into pious-inspired briefs that were submitted to courts of law in favor of a dignified death has revealed that in the *Baxter v. Montana*[1031] Court of Appeals case – a decision that decriminalized the State of Montana's statutory criminal ban to physician-assistance suicide[1032] - the aforementioned Amici had cited the same publication and exact quotation in their brief in order to support the decriminalization of the statuary ban.[1033]

An additional in-depth study of the *Glucksberg*[1034] and *Quill*[1035] Supreme Court briefs has shown that in their role to rectify the *Compassion in dying, en*

[1030] Neely, *The Right to Self-Directed Death: Reconsidering an Ancient Proscription*, 36 Cath Law 111 (1995) cited in Brief 36 Religious Organizations *et al.,* supra note 927 at 11 [emphasis added].

[1031] *Baxter, super* note 295.

[1032] *Ibid.*

[1033] Neely, supra note 1030 cited in *Baxter v Montana,* MT DA 09-0051, 2009 MT 449 [WL 1967448] [Brief of Religious Amici Baxter at viii].

See especially *Robert Baxter; Steven Stoelb; Stephen Speckart, M.D.; C. Paul Loehnen, M.D.; Lar Autio, M.D.; George Risi, JR., M.D.; and Compassion & Choices, Plaintiffs and Appellees, vs. State of Montana and Steve Bullock, Defendants and Appellants.* BRIEF OF RELIGIOUS AMICI CURIAE ON BEHALF OF BAXTER, case no. DA 09-0051, in the Supreme Court of the State of Montana.

[1034] *Glucksberg*, *supra* note 114.

banc[1036] Christian historical stance on martyrdoms, faith followers that were composed of the United States Catholic Conference, the New York Catholic Conference, the Washington State Catholic Conference, *et al*. had argued that Reinhardt's position in regards to Christian martyrdoms was flawed.[1037]

These religious Amici had noted that the objective **"of martyrdom was to remain faithful, not to intend one's death"**.[1038] The Christian groups had contended that "**Christian Leaders" had admired "martyrs**", because despite the "threat of death" for their religious beliefs, martyrs had remained true to their "faith".[1039] The same "**Christian Leaders" also had frowned upon individuals seeking to hasten a "martyr's death"**.[1040]

In a second brief that was submitted by Christian legal and medical professionals[1041] the Amici had reminded the Supreme Court of the **religious-**

[1035] *Quill, supra* note 114.

[1036] *Compassion in Dying, en banc, supra* note 805.

[1037] Brief US Catholic Conference *et al.,* supra note 910 at 33.

[1038] *Ibid* at 33 [emphasis added].

[1039] *Ibid* at fn 11; Coleson, supra note 908 at 34.

[1040] *Ibid;* Brief US Catholic Conference *et al.,* supra note 910 at fn 11.

[1041] Brief Christian Legal Society *et al.*, supra note 911.

inspired negative stigma attached to intentional dying by maintaining that "**early Christians rejected suicide and euthanasia**".[1042]

Thus, in contrast to Justice Reinhardt's analogy of "Christian martyrs, who died rather than renounce their faith, as examples of the acceptance of suicide among early Christians" the Amici Curiae had contented the following: "earlier historians" had blatantly inflated the actual amount of "early Christian martyrs" that had occurred, along with the notion of "eagerness" to become a martyr.[1043]

As was pointed out by Dr. Amundsen in rejecting Justice Reinhardt's stance that the Christian martyrdom was suicide: that **only a minuet amount of "Christians" had "actively taken their lives" in the antiquity of Christianity – prior to "the legalization of Christianity" - and that these deaths were consequential to the "Great Persecution**".[1044] Thus, **voluntary Christian suicides that had taken place were to avoid being arrested, imprisoned, "tortured, or executed" and raped– acts that were oft-associated with Christian martyrdoms**.[1045]

[1042] *Ibid* at *26.

[1043] *Ibid.*

[1044] Amundsen, supra note 836 at 407, 408 (emphasis added).

[1045] *Ibid* at 408 [emphasis added].

It remains to note that it was observed that **martyrs who had "died" instead of opting to the renunciation of their pious beliefs had not agreed to a form of voluntary "suicide"**,[1046] whilst the aforementioned Amici had presented in the submission of their Supreme Court brief that **"submitting to forced martyrdom is not equivalent to modern practices of voluntary suicide"**.[1047]

It would appear that the above-mentioned research has shown that the notion of "voluntariness" has not been relevant to establish a correlation between suicide, the practice of historical Christian martyrdoms and assisted suicide. In contradiction to this premise, theologians, Dr. Authur J. Droge and James D. Taylor had claimed that the term suicide should be abandoned and replaced with the words "voluntary death".[1048]

Voluntary death, as proposed by these authors was meant to "describe the act resulting from an individual's intentional decision to die, either by his own agency, by another's, or by contriving the circumstances in which death is the known, ineluctable result".[1049]

[1046] Coleson, supra note 909 at 39 [emphasis added].

[1047] *Ibid;* Brief Christian Legal Society *et al.*, supra note 911 at *26 [emphasis added].

[1048] Authur J. Droge & James D. Taylor, *A Noble Death: Suicide and Martyrdom among Christians and Jews in Antiquity* cited in Darrel W. Amundsen, supra note 836 at 404 fn 99.

[1049] *Ibid.*

Thus, according to these theologians the definition of **"voluntary death" would not differentiate between the practices of suicide and martyrdom**.[1050] Furthermore, as was presented by the authors their historical findings would indicate that "[v]oluntary death […] was one of the ideals on which the church was founded" upon.[1051]

These explanations have remained highly controversial. For critics have maintained that these theologians had incorrectly attempted to comprehend "the ways in which voluntary death was evaluated in antiquity".[1052] For instance, in support of their assertion these theologians had discussed the voluntariness of Judas' suicide[1053].

It is paramount to take notice that the work of Dr. Droge and Taylor was referenced in one of the *Glucksberg*[1054] Supreme Court brief.[1055] The Southern

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[1050] *Ibid* [emphasis added].

[1051] *Ibid* [ellipsis added].

[1052] *Ibid.*

[1053] The authors explained that Judas was berated for having been disloyal towards Jesus, but that Judas was not reprimanded for having committed suicide. See Droge & Taylor, supra note 1049 at 404 fn 99; The authors also discussed "Jesus' death and the ideology of a voluntary death of Jesus, noting "the authors of the Gospel created [sic] a Jesus who died by his own choice, if not by his own hand". See Droge & Taylor, supra note 1049 at 404 fn 99.

[1054] *Glucksberg, supra* note 114.

[1055] Brief Southern Center, super note 912.

Center for Law and Ethics had **forewarned the Supreme Court that Droge and Taylor's wide interpretation of 'voluntary death' was absurd**.[1056]

The Southern Center for Law and Ethics had observed that the definition of "voluntary death" that was proposed by Droge and Taylor was similar to the definition that sociologist Emile Durkheim had given to his meaning of suicide.[1057] These Amici, along with the Christian legal and medical Amici had noted in two separate briefs that Durkheim had defined "suicide" as, "[a]ll cases of death resulting directly or indirectly from a positive or negative act of the victim himself, which he knows will produce this result."[1058]

Thus, in accordance to the Amici, Droge and Taylor emphasized Durkheim's notion of suicide, which included**, "the death of Christian martyrs" [which] was an "(altruistic) suicide", because the martyrs had "voluntarily allowed their own slaughter"**.[1059] Even though a martyr died for his/her religious belief, it was to be construed to be "suicide".[1060]

[1056] *Ibid* at 10 [emphasis added].

[1057] *Ibid;* This was equally noticed by author, Amundsen, see supra note 836 at 404 fn 99.

[1058] Durkheim, *Le Suicide* cited in Brief Southern Center, supra note 912 at 10; Brief Christian Legal Society *et al.*, supra note 911 at *28 [capitalization omitted].

[1059] Durkheim, *Le Suicide* cited in Brief Southern Center, supra note 911 at 10; Authur J. Droge and James D. Taylor, *A Noble Death: Suicide and Martyrdom among Christians and Jews in Antiquity* cited in Brief Southern Center, supra note 912 at 10 [emphasis added]; Droge & Taylor, supra note 1049.

In the *Compassion in Dying*[1061] *en banc* case a review of Justice Reinhardt's analysis of the "Historical Attitudes of Suicides" has shown that the Justice had referred to the research of Durkheim – *Suicide: A Study in Sociology*.[1062] Nonetheless, in contesting the opinion of Reinhardt on martyrdoms, the Christian legal and medical professionals had asserted in their Supreme Court brief that the work of **Durkheim was not an appropriate reference "for the early Christian acceptance of the type of suicide at issue in this case**."[1063]

b. An Imitation of the Death of Christ

It is interesting to take notice that The Southern Center for Law and Ethics had also presented to the Supreme Court the contention that **the practice of martyrdom by the early Christians was not to be perceived as self-murder, but as a replica of "Christ's death"**.[1064]

[1060] *Ibid;* Brief Christian Legal Society *et al.,* supra note 911 at *28.

[1061] *Compassion in Dying, en banc,* supra note 805.

[1062] Emile Durkheim, *Suicide: A Study in Sociology* 330 (John A. Spaulding & George Simpson trans., 1951) (citing Libanius) cited in *Compassion in Dying v Washington*, *supra* note 805 at fn 22.

[1063] Brief Christian Legal Society *et al.,* supra note 911 at *28 [emphasis added].

[1064] Brief Southern Center, supra note 912 at 4 [emphasis added].

Paradoxically, it was equally observed that the religious Amici Curiae, who had supported the legalization of one's choice to undertake a hastened death in their *Glucksberg*[1065] and *Quill*[1066] Supreme Court brief had also provided a discourse about the death of Christ and His "suffering", and the connection between Jesus' endurance of pain in the realm of contemporary physician-assisted suicide.[1067] Although absent from the mention of martyrdoms or martyrs, the Amici had provided the submission that **some Christians as part of their religious faith might wish to imitate the suffering that Christ had to endure**.[1068]

There seems to have been three reactions to support their argument.

Firstly, terminally–ill faith-followers perhaps would be more inclined to refuse medical-aid in dying.[1069] Secondly, **others with a "terminal conditions" may "long for death" in order to meet their Creator; thus a "voluntary hastened death" would constitute an exercise of their pious belief**.[1070]

[1065] *Glucksberg, supra* note 114.

[1066] *Quill, supra* note 114.

[1067] Brief 36 Religious Organizations *et al.* for Respondents, supra note 927 at 9.

[1068] *Ibid* [emphasis added].

[1069] *Ibid* at 9.

[1070] *Ibid* [emphasis added].

Thirdly, a belief founded upon one's pious conviction that suffering would create a distance from the Almighty; as a result if one were to be subject to a terminal illness, quite possibly one would not be opposed to undertake physician-assistance to suicide.[1071]

According to these Amici, regardless of the position a person may choose to adopt, choices had to be respected; otherwise, legally it would not only constitutionally violate the *Due Process Clause of the Fourteenth Amendment*[1072], but also the *Free Exercise Clause of the First Amendment*.[1073]

It appears that a similar argument based upon Christ's suffering and His "crucifixion" was later submitted by the same Amici in a brief that was addressed to the *Baxter v. Montana*[1074] Court of Appeals, where the Amici had contended that the non-respect of all "religious and spiritual beliefs" in context of death of a "terminally ill" would lead to a violation of "Montanan's [sic] Constitutional rights protected by the Establishment Clause."[1075]

[1071] *Ibid* at 9.

[1072] *US Const amend XIV*.

[1073] *Ibid; US Const amend I*; Brief 36 Religious Organizations *et al.* for Respondents at, supra note 927 at 5 – 7, 9.

[1074] *Baxter, supra* note 295.

[1075] *Ibid;* Brief of Religious Amici Baxter, supra note 1034 at vii.

In contrast, the Amicus for the Southern Center for Law and Ethics[1076] in their dialogue pertaining to the imitation of "Christ's death" had relied on the following summarization of a tradition Christian stance on martyrdom, along with Justice Reinhardt's alleged flawed perception that martyrdom was suicide to negate the legalization "to control the manner and time of one's death":

> Martyrdom, prior to the legalization of Christianity, was a special situation involving state persecution of a specific religion. **Martyrdom was not indicative of a general desire for death, but only for death at the hands of another for the sake of Christ, in imitation of Christ's death**. It was that which was "tempting". Death as a release from physical or mental suffering was not an issue. Hence, Christianity did not teach that one had a general right to control the end of one's own life, but to the contrary, that one was not permitted to do so. **Denominating the acceptance of martyrdom for one's religion**

[1076] Brief Southern Center, supra note 912 at 4.

> **faith as a form of "suicide" is hopelessly confusing, and obscures rather than clarifies the issues related to physician-assisted suicide. Judge Reinhardt's thinking and terminology are so muddled that he is willing to consider Christians executed for their faith as "suicides"** […].[1077]

To corroborate the aforementioned explanation of martyrdom it was observed in "Faith and Reason and Physician-Assisted Suicide"[1078] that the death of "Jesus was the archetype of the martyr",[1079] and that the death and suffering of "Christ" was an obedient act of "the Father's will",[1080] and not a suicide.[1081]

It is interesting to take notice that the core of the article was to contradict an essay entitled, "Assisted Death and Martyrdom"[1082], where the author had

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[1077] *Ibid* at 4.

[1078] Christopher Kaczor, "Faith and Reason and Physician-Assisted Suicide" (1998) 4:2 Christian Bioethics 183 online: Christian Bioethics, Oxford Academics < http://www.academic.oup.com >.

[1079] *Ibid* at 188.

[1080] *Ibid* at 187.

[1081] *Ibid* at 186 -188.

[1082] Thomasma, supra note 991.

claimed that **the practice of several historical landmark Christian martyrdoms narratives could provide clarification for the practice of suicide and assistance to suicide**.[1083]

For instance, according to Thomasma, one of the best cases that has supported the claim that an act of martyrdom may quit possibly be construed as suicide, and equally as assistance to suicide, was with the death of Saint Perpetua, because it was a "self-administrated death [that was committed] by a saint.[1084] Paradoxically, in the domain of dying with dignity Thomasma had contended that "legal" disputes - amongst others – whether they advocated or negated the practices eventually provided some form of equilibrium amongst their various disagreements.[1085] But that "**religious arguments against euthanasia and**

[1083] *Ibid* (emphasis added).

[1084] A non-exhaustive study of St. Perpetua has revealed that the recollection of her death was based on "direct data" that originated out of her "diary", which was evidenced by "eyewitness". Perpetua was a twenty-two year old married female, and a mother of a young baby. Perpetua and "her attendant" were "arrested by Roman authorities in 202 A.D." The reason for their apprehension was because they were Christians. Perpetua had declined to abandon her Christian belief. As a result she was sentenced to death; "condemned to the beasts". The ruling of her impending death, had allegedly caused her to rejoice, by stating that "[w]e were overjoyed as we went back to the prison cell". In the coliseum, it had appeared that St. Perpetua's had **requested and consented an assistance to suicide**, for "[a] gladiator [was] summoned to kill her, but his hand begins to tremble. [St. Perpetua had] guide[d] his hand to her throat to help him". Quit possibly "[**t]his assistance in her own dying**, this treasuring of her **martyrdom for Christ**", was imperative, for it was commented upon, by asserting that "Perhaps it was that so great a women, feared as she was by the unclean spirit, **could not have been slain had she not herself willed it**".

Thomasma, supra note 991 at 134 – 135 [capitalization omitted & words & emphasis added].

[1085] *Ibid* at 123.

assisted suicide" were the sole reasoning that could actually provide a true distinction in the domain.[1086]

Thus, in the realm of the debate of physician-assisted suicide this segment has evidenced that there appears to have existed two distinct schools of thoughts regarding the accuracy of early Christianity martyrdoms; one, which has supported Justice Reinhardt's stance that historically Christian martyrdoms were suicides. The second, which has sustained conventional Christian teaching that martyrdom has never been perceived as suicide, but as an honorable religious act.

3. Augustine's Ban to Suicide

It was cited in the *Compassion*[1087] *en banc* physician-assisted suicide court debate that in accordance to, Thomas Marzen, "Suicide: A Constitutional Right?"[1088], "**confusion regarding the distinction between suicide and martyrdom existed up until the time of St. Augustine (354-430 A.D.)**".[1089]

[1086] *Ibid* (emphasis added).

[1087] *Compassion in Dying*, *en banc, supra* note 805.

[1088] Thomas J. Marzen *et al*., supra note 1024.

[1089] *Ibid* at 26 cited in *Compassion in Dying, en banc, supra* note 805 at para 78 (emphasis added).

Inquiries have shown that St. Augustine was a Catholic theologian and philosopher, who was well respected in the Christian community.[1090]

Extended studies have revealed that in the *Compassion in Dying*[1091]*, en banc* decision, and in the Supreme Court brief of the pious groups in support of the respondents, both Reinhardt and the Amici were of the opinion that "suicide" was found to be absurd by Augustine of Hippo.[1092] Reinhardt had asserted that Augustine had taken notice that the Donatists had "kill[ed] themselves out of respect for martyrdom [and that it was] their daily sport".[1093] The Justice, along with the pious-inspired *Amici Curiae* had concurred that Augustine had contended that committing suicide was a "detestable and damnable wickedness", it remained that "**the Christian view that suicide was in all cases a sin and crime held sway for 1000 years**".[1094]

[1090] Augustine of Hippo, online: Theopedia < https://www.theopedia.com >.

[1091] *Compassion in Dying*, *en banc, supra* note 806.

[1092] *Ibid;* Brief 36 Religious Organizations *et al.* for Respondents, supra note 927 at 11.

[1093] *Compassion in Dying*, *en banc, supra* note 805 at para 78.

[1094] *Ibid*; Brief 36 Religious Organizations *et al.* for Respondents, supra note 927 at 11; Brief Christian Legal Society *et al.,* at *24.

It remains paramount to take notice that in accordance to the Supreme Court brief of the Catholic Heath Association of the United States[1095] - opponents to the legalization of physician-assisted suicide - it appears that **the initial historically classification of the crime of suicide was based upon Augustine's ban to suicide to avoid sin that was founded upon the Christian belief, which "condemned suicide" because "the prohibition against killing applie[d] to all persons, including oneself"**.[1096]

a. The Foundation to the Christian Ban to Suicide and its Assistance

An unabridged review of the *Glucksberg*[1097], *Quill*[1098] and *Baxter v. Montana*[1099] briefs has revealed that Augustine was the pious orchestrator of the prohibition to self-murder.[1100] Referring to *The Sanctity of Life and the*

[1095] Brief Catholic Health Association, supra note 914.

[1096] *Ibid* (a second argument was based upon the work of St. Thomas Aquinas at *8) [words and emphasis added].

[1097] *Glucksberg, supra* note 114.

[1098] *Quill, supra* note 114.

[1099] *Baxter, supra* note 295.

[1100] Brief 36 Religious Organizations *et al.* for Respondents, supra note 927 at 11-12; Brief of Religious Amici Baxter, supra note 1034 at viii.

Criminal Law[1101], **Augustine was regarded as "the chief architect" of the religious ban to suicide**; for Augustine's pious ban to suicide had advanced "the Roman Catholic view that suicide violates the Commandment against killing".[1102]

An examination of the judges of the courts of law and their perception of Augustine and suicide in physician-assisted suicide debate has revealed that in the *Compassion in Dying,*[1103] en banc case, Justice Reinhart had claimed that Augustine "was able to help turn the tide of public opinion" on the once tolerable practice of suicide amongst early Christians.[1104] Whilst, dissenting Justice Beezer had referenced that "St. Augustine opposed suicide as violation of the sixth commandment ("thou shall not kill.") Marzen at 27."[1105] And, in the *People v Kevorkian*[1106] opinion, Justice Kaufman had cited the work of Alvarez, which claimed that:

[1101] Glanville L William & Alfred A Knopf, *The Sanctity of Life and the Criminal Law* (New York, 1957).

[1102] *Ibid* at 255 cited in Brief of Religious Amici Baxter, supra note 1034 at viii; Brief 36 Religious Organizations *et al.* for Respondents, supra note 927 at 11-12 [emphasis added].

[1103] *Compassion in Dying, en banc,* supra note 805.

[1104] *Ibid* at para 78.

[1105] *Ibid* at para 257.

[1106] *Kevorkian*, *supra* note 871.

> The idea of suicide as a crime comes late in Christian doctrine and as an afterthought. It was not until the sixth century that the Church finally legislated against it, and then the only Biblical Authority was a special interpretation of the Sixth Commandment: 'Thou shall not kill.' The bishops were urged into action by St. Augustine [….] .[1107]

Subject to his work, the author Thomasma reminds us that **the law prohibiting "killing" was attributed to a "form of faith in God himself, a faith that God Who created and redeemed can also save those whom He will**".[1108]

[1107] Justice Kaufman had further cited that, "[…] but he, as Rousseau remarked, took his arguments from Plato's *Phaedo*, not from the Bible", and in accordance to the Justice, Plato's *Phaedo* conveys that Socrates' death had appeared to have occurred by his intake of hemlock.

In the *Compassionate, en banc* case, dissenting Justice Beezer had observed that "death should not be hastened by suicide". Further adding that Socrates had provided the following explanation, "[i]t probably seems strange to you that it should be right for those to whom death would be an advantage to benefit themselves […]". The Justice continued by observing that Plato did not favor "suicide".

In contrast, Justice Reinhardt was of the opinion that although Socrates "counseled his disciplines against committing suicide" he willing drank the hemlock as he was condemned to do, and his example inspired others to end their lives […] Plato, Socrates' most distinguished students, believed suicide was often justifiable.

See *Kevorkian*, *supra* note 871 at *11; See *Compassion in Dying, en banc, supra* note at 806 at para 68, 250 [ellipses added].

[1108] Thomasma, supra note 991 at 122.

Perhaps, it is comprehendible then that "the theological rejection of euthanasia and assisted suicide" has been based on the premise that because a human being's existence is reliant upon God's will, "life" cannot be "taken with impunity".[1109] In a religious context, killing "oneself" or another person– regardless of cause - rejects "the power and presence of God in the lives of human beings".[1110] Such practice would be subject to "a form of disbelief" in God, for one would be acting in God's capacity as the "[C]reator"; for s(he) would be taken "dominion over life".[1111]

[1109] *Ibid* at 129.

[1110] *Ibid* at 129, 137.

[1111] The "disbelief in God" may be perceived as a "dysfunction to human life", which can be attributed to the biblical teaching of the "original sin" doctrine. For instance, the Old Testament offers such evidence through the "fratricide of Cain and Abel". This act was the first biblical murder.

Thus, throughout the "Old Testament" the notion of "death" can be classified as "an evil". When it is categorized as such, it supports the commandment that one shall not kill. The teaching of the biblical figures, Adam and Eve, as found in "the Garden of Eden story" further supports this assertion; "for death is an evil [that was] not originally intended by God for human life".

The doctrine of "Satan" also provides an explanation that "death" can be classified as "an evil". According to "Christian myths", Lucifer, is "God greatest creature"; the demon possessed great strength that causes him to overstep "his creaturely boundaries" and to inaccurately believe that he is the Divine. This explanation maybe used as an analogy to the perception that "evil [has] a lack of boundaries".

In the context of assistance to dying, this explanation can be applied as a deductive reasoning that would result in the following conclusion; no matter which form of participation takes place in a killing, it reveals that one has not respected their creaturely "boundaries", thus through killing one has engaged in an "evil action".

Nonetheless, it is imperative to take notice that the concept of "death" may also be seen as a "good". For it appears that the New Testament had brought forth a new faith in death. By the same token, this belief had bestowed some form of rational for the suspension of the "rule against killing". For instance, the practice of baptism has brought forth the ideology of, "death to sin and a renewed life". And through the "death" of "Christ" human beings have been saved from their sins. Fundamentally, "death is an ontological evil for personal bodily identity, [but]

In the legal context, an historical examination of the evolution of anti-suicide laws that were based on Augustine's originally pious stance against suicide was evidence in a study of the submissions of the religious *Amici Curiae*, who supported the legalization of a dignified death in the *Glucksberg*[1112] and *Quill*[1113] briefs, and subsequently in the *Baxter v. Montana* brief.[1114]

The Amici had begun their repertoire by referring to *Life, Death and the Law: Law and Christian Morals in England and the United States*.[1115] The author of

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it is a spiritual good because it brings about the maturing of the Christian into a new life". Thus, death can be seen as a "good", and "intending or willing it" may be perceived honorable; especially when death is sought for a "higher purpose". It can be suggested that this explanation provides an important framework for the practice of martyrdom.

It remains that in the context of physician-assisted to dying when applying the religious prohibition "against killing" to insinuate that an individual should not "intend the death of another" the argument most probably remains too simplistic and superficial. For the request and consent by the terminally ill patient to undertake medical assistance to dying may be perceived as a "good". As an exemplar, in the medical arena it is not uncommon to acknowledge that "death is often seen as a friend, a rescuer from suffering, and a relief". Furthermore, when the procedure is conducted in a regulated and caring manner the medical professional who intends to perform the act is also creating a "good", for the medical professional can quit possibility be "subsumed into God's greater redemptive plan". For in accordance to Christian belief "death is for the Christian a new birth into the resurrected life promised through Christ and already experienced in the world".

See especially Thomasma, supra note 991 at 129, 130, 137 [words added].

[1112] *Glucksberg, supra* note 114.

[1113] *Quill, supra* note 114.

[1114] Brief 36 Religious Organizations *et al.* for Respondents, supra note 927 at 11,12; Brief of Religious Amici Baxter, supra note 1034 at vii, viii, ix.

[1115] Norman St. John-Stevas, *Life, Death and the Law: Law and Christian Morals in England and the United States* (Washington D.C: Beard Books, 1961) at 233, 249 cited in Brief of Religious Amici Baxter, supra note 1034 at viii; Brief 36 Religious Organizations *et al.* for Respondents, supra note 927 at 11.

this novel had further cited a mid-nineteenth century book entitled *General History of the Christian Religion and Church*[1116] in order to demonstrate that Augustine's ban to "suicide" had in due course been integrated into "the [C]anon [L]aw of the Catholic Church".[1117] Thus, historically, England's "Council of Hereford" had embraced "Roman Catholic [C]anon [L]aw", along with its ban to self-murder.[1118] This led "the prohibition against suicide [to become] part of the [C]ommon [L]aw of England".[1119]

It was previously noted in this dissertation that Justice Rehnquist in the *Glucksberg*[1120] case had begun his historical analysis of suicide by referring to Justice Scalia in the *Cruzan*[1121] Supreme Court case, and had noted that "for

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[1116] Joseph Torrey, *General History of the Christian Religion and Church*, translated from German of Dr. Augustus Neander, vol 3 (London: Henry G. Bohn, 1851) cited in St. John-Stevas, supra note 1115; See Brief of Religious Amici Baxter, supra note 1034 at viii; See Brief 36 Religious Organizations *et al.* for Respondents, supra note 927 at 11.

[1117] *Ibid;* Brief of Religious Amici Baxter, supra note 1034 at viii [capitalization added].

[1118] See Brief 36 Religious Organizations *et al.* for Respondents, supra note 927 at 11 [capitalization added].

[1119] *Ibid* [words and capitalization added].

[1120] *Glucksberg, supra* note 114.

[1121] *Cruzan, supra* note 84.

over 700 years the Anglo-American common law tradition" had not approved of "suicide " and of its assistance.[1122]

In the *Glucksberg* case the Justice had demonstrated that "*England adopted the ecclesiastical prohibition on suicide […] in the year 673 at the Council of Hereford […]*".[1123] In forgoing his review of early Christianity and suicide the Justice had not noted that quite possibly, Augustine, during early Christianity, had inspired the ban.[1124]

In further discussing the Amici Curiae's submissions that religion had influenced early Common Law, their *Glucksberg*, *Quill* and *Baxter* briefs have shown that in the *Compassion in Dying*[1125]*, en banc* case dissenting Justice Beezer had acknowledged that "ecclesiastical law" had presented itself as a paramount influence in the escalation of " the English law order".[1126]

[1122] *Glucksberg*, *supra* note 114.

[1123] *Glucksberg*, supra note 114 at fn 9.

[1124] *Glucksberg, supra* note 114.

[1125] *Compassion in Dying, en banc, supra* note 805.

[1126] *Ibid* at para 845; Brief 36 Religious Organizations *et al.* for Respondents, supra note 927 at 11; Brief of Religious Amici Baxter, super note 1034 at ix.

A further in-depth reading of the *Compassion in Dying, en banc* decision has revealed that it appears that in order to support his claim Justice Beezer had not only referenced St. Augustine's opposition to suicide based on a violation of the commandment of God, but that he had also referred to St. Thomas Aquinas' *Summa Theologica* [1127] and his "three reason[s]" to oppose "suicide"[1128]:

> [First] suicide is contrary to the inclination of nature, and to charity whereby every man should love himself [;] […] [second] , every man is part of the community, [and] by killing himself he injures the community [;] […] [third], because **life is God's gift to man, […] whoever takes his own life, sins against God**.[1129]

The same aforementioned Amici Curiae - who had advocated for a form of legal assistance to dying - in their briefs had also contended that "one of the first English law treaties […] [which] explained that suicide was criminalized

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[1127] St. Thomas Aquinas' *Summa Theologica*, II-II q 64 art 5 cited in *Compassion, en banc, super* note 805 at paras 257 – 259.

[1128] *Ibid* [letter added].

[1129] *Ibid* at 258, 259 [words, punctuation, ellipses & emphasis added].

based on Augustine rationale" was with Henry de Bracton*'* s *De Legibus et Consuetudinibus Angliae*.[1130]

It is paramount to take notice that Justice Rehnquist in *Glucksberg*[1131] had referred to Henry de Bracton and his "legal" treaty by emphasizing Bracton's claim: *"[j]ust as a man may commit felony by slaying another so may he do so by slaying himself"*; this constituted as a "*crime*" and in the avoidance of "*conviction and punishment*", both real property and personal property where "*forfeit to the king*".[1132]

Paradoxically, Justice Rehnquist had continued Bracton's profess by adding: "*thought Bracton, 'if a man* ***slays himself in weariness of life or because he is unwilling to endure further bodily pain*** *... [o]nly his movable goods [were] confiscated'. "*[1133]

[1130] 2 H. de Bracton, *De Legibus et Consuetudinibus Angliae* 505 (Sir Travers Twissed. 1879) cited in Brief of Religious Amici Baxter, super note 1034 at viii & cited in Brief 36 Religious Organizations *et al.* for Respondents, super note 927 at 11 [ellipses and word added].

[1131] *Glucksberg, supra* note 114.

[1132] *Ibid*.

[1133] *Ibid.*

It remained that Bracton's exception to forfeit real property due to certain cases of suicide was observed by Justice Reinhardt in the *Compassion in Dying*[1134], *en banc* case as being an "**innovation [that] was incorporated into English common law", which had been brought forth, "with compassion and understanding", toward "suicides" that were the result of "the inability to 'endure further bodily pain'**."[1135]

Whilst, dissenting Justice Beezer, in the *Compassion in Dying, en banc* decision had also cited Bracton's views, and was of the opinion that a "suicide", which was committed by "a sane person" was inserted into the Anglo "common law" and was classified as a "felony".[1136]

A final reading of the *Glucksberg*, *Quill* and *Baxter* physician-assisted suicide briefs has shown that the pious Amici for the respondents, in their role to assure the accuracy of Christianity and suicide had submitted the claim that the religious rationalization of suicide had persisted amongst "English legal scholars".[1137] This was confirmed in *Historia Placitorum Coranae*[1138] where

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[1134] *Compassion in Dying*, *en banc, supra* note 805.

[1135] *Ibid* at para 80 [words and emphasis added].

[1136] *Ibid* at para 260.

[1137] Brief of Religious Amici Baxter, super note 1034 at ix; Brief 36 Religious Organizations *et al.* for Respondents, super note 928 at 11.

"Sir Matthew Hale" had acknowledged that "[n]o man hath the absolute interest of himself but: 1. God almighty hath an interest and propriety in him, and therefore self-murder is a sin against God."[1139]

According to these Amici their claim that a religious ban to suicide persisted throughout history was also made evident in the examination of the *Blackstone Commentaries*[1140], where Blackstone had noted that "suicide was a 'spiritual' offense" on account that one's suicidal act "**invad[ed] the prerogative of the Almighty, and rush[ed] into [H]is immediate presence uncalled for**."[1141] Blackstone's Christian approach to law was later discussed in order to demonstrated that "[C]ommon [L]aw had been heavily influenced by Christian philosophy".[1142]

[1138] I M. Hale 411-12 (1736).

[1139] *Ibid* cited in Brief of Religious Amici Baxter, super note 1034 at ix & cited in Brief 36 Religious Organizations *et al.* for Respondents, super note 927 at 11.

[1140] ch 14, 189 (1765).

[1141] *Ibid* cited in Brief of Religious Amici Baxter, super note 1034 at ix & cited in Brief 36 Religious Organizations *et al.* for Respondents, super note 927 at 11 [capitalization, letters & emphasis added].

[1142] Augusto Zimmermann, "A Law above the Law: Christian Roots of the English Common Law" (2013) 1 Glocal Conversations 85, 86, 87 online Glocal Conversations: University of the Nations http://www.gc.uofn.edu ; Dr. Augusto Zimmermann, online: Murdoch University < http://www.profiles.murdoch.edu.au >.

For instance, Dr. Zimmermann had observed that Blackstone had claimed "that the [C]ommon [L]aw [was] founded on the basis of both natural and revealed law", and that human law was not entitled to supersede these laws.[1143]

Fundamentally, according to Blackstone:

> Natural law, being coeval with mankind and dictated by God himself, is of course superior in obligation to all other. It is binding over all the globe, in all countries, and at all times; no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original."[1144]

It is interesting to observe that Zimmermann additionally claimed that Blackstone's link between natural law and God later revealed the "philosophical foundations of American constitutionalism".[1145]

[1143] Zimmermann, super note 1142 at 95 [capitalization and words added].

[1144] *Ibid* at 95.

[1145] *Ibid.*

b. The Constitutional Arguments

It is imperative to take notice that it appears that the aim of the aforementioned historical repertoire on Augustine's Christian-inspired ban to suicide was - in accordance to the *Glucksberg*, *Quill*, and *Baxter* briefs, which were submitted by the *Amici Curiae* in support of dying with dignity - to demonstrate that **the origin of Augustine's disallowance of the practice of suicide was the foundation of contemporary laws that have provided an absolute prohibition to physician-assistance to dying**.[1146]

Thus, similar to this dissertation's previous Canadian discourse, which has discussed that the former absolute ban to Canada's physician-assisted suicide law was unconstitutional because quit possibly it served a "religious purpose"[1147], in the *Glucksberg*, *Quill*, and *Baxter* briefs **the religious Amici Curiae had contended that the laws prohibiting physician-assisted suicide offended the "long tradition of religious liberty", and as a result these laws infringed not only the *Free Exercise Clause of the U.S. Constitution,* but equally the *Establishment Clause of the First Amendment of the United States Constitution***.[1148]

[1146] Brief of Religious Amici Baxter, super note 1034; Brief 36 Religious Organizations *et al.* for Respondents, super note 927.

[1147] See The Religious Objective of s. 241(b) of the *Criminal Code,* above, for more on this topic.

The portion of the First Amendment of the U.S. Constitution that is relevant to this essay is read as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof […].[1149]

[1148] Brief of Religious Amici Baxter, super note 1034 at vii, xvii, xviii, xix, xx; Brief 36 Religious Organizations *et al.* for Respondents, super note 927 at 5, 6, 11, 12; *U.S. Const. amend I*.

The First Amendment contains the Establishment Clause and the Free Exercise Clause. According to *Black's Law Dictionary*, the Establishment Clause is:

> That provision of the First Amendment to U.S. Constitution which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise of thereof [. . .]". Such language prohibits a state or the federal government from setting up a church, or passing laws which aid one, or all, religions, or giving preference to one religion, or forcing belief or disbelief in any religion.

See *Black's Law Dictionary,* supra note 3, *sub verbo* "the Establishment Clause" [ellipses added].

Whilst freedom of religion, which is also embraced by the Free Exercise Clause is the:

> Freedom to individually believe and to practice or exercise one's belief. […] This First Amendment protection embraces the concept of freedom to believe and freedom to act, […] Such freedom means not only that civil authorities may not intervene in affairs of the church; it also prevents church from exercising its authority throughout state.

See *Black's Law Dictionary,* supra note 3, *sub verbo* "the Free Exercise Clause" [ellipses added].

[1149] *U.S. Const. amend I*; *Black's Law Dictionary,* supra note 3, *sub verbo* "the Establishment Clause" & "the Free Exercise Clause" [ellipsis added].

As noted by the Amici, it is imperative to note that central to "the Establishment Clause" of the U.S. Constitution lays the interdiction that the government cannot favor a specific "religion" or "religion" in general.[1150]

Thus, it was argued by the *Glucksberg*[1151] and *Quill*[1152] pious-inspired Amici – for the respondents - that **the Washington and New York statutes served a "religious purpose", more specifically a Catholic prohibition to assistance to suicide due to Augustine's beliefs**.[1153]

In addition, via the doctrine of freedom of religion the Amici had claimed that "terminally ill" individuals, who decided to undertake dignified deaths were in fact making "deeply personal, intimate, and often spiritual" choices, which "[were] reserved to the individual's own conscience", and that were most-oft

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[1150] Brief of Religious Amici Baxter, super note 1034 at xvii, xviii, xix, xx; Brief 36 Religious Organizations *et al.* for Respondents, super note 927 at 10; *U.S. Const. amend I; Black's Law Dictionary,* supra note 3, *sub verbo* "the Establishment Clause".

[1151] *Glucksberg, supra* note 114.

[1152] *Quill, supra* note 114.

[1153] Brief 36 Religious Organizations *et al.* for Respondents, super note 927 at 5, 10, 11, 12.

It is important to observe that the Amici had affirmed that the "government" was able to formulate regulations to protect terminal-ill individuals by verifying that their decisions were "voluntary and informed", but that the "government" was not entitled to completely prohibit their "choice". For an absolute prohibition would violate the constitutional "interests protected by the *Free Exercise Clauses of the First Amendment* as well as the liberty component of the *Fourteenth Amendment's Due Process Clause"*.

See Brief 36 Religious Organizations *et al.* for Respondents, supra note 927 at *1 [italicized added]; *U.S. Const. amend I; U.S. Const. amend XIV*.

achieved after one had prayed, mediated and consulted with medical professionals and various ecclesiastics.[1154]

Referring to the *United States v. Seeger*[1155] Supreme Court case the Amici had quoted that **"[w]e frequently turn to religion" when we are faced with choices that advance "profound issues of human meaning and purpose** […], which, strike to the very core of our being and integrity as persons."[1156] When turning to religious guidance, people "expect from various religions answers to the riddles of the human condition: […] What is the meaning and purpose of our lives? [...] What are death, judgment, and retribution after death?".[1157] The Amici Curiae had also referenced the *Cruzan*[1158] case, more specifically dissenting Justice Stevens, who had previously asserted that, "**not much may be said with confidence about death unless it is said from faith**."[1159]

[1154] See Brief 36 Religious Organizations *et al.* for Respondents, supra note 927 at *11 [word added]; *U.S. Const. amend I.*

[1155] *United States v Seeger* 380 US 163, 182 (1965) cited in Brief 36 Religious Organizations *et al.* for Respondents, supra note 927 at *11.

[1156] *Ibid* [capitalization omitted, emphasis & ellipsis added].

[1157] *Ibid* [ellipses added].

[1158] *Cruzan, supra* note 84.

[1159] *Ibid* at 343 *cited* in Brief 36 Religious Organizations *et al.* for Respondents, supra note 927 at *11 (emphasis added).

In accordance to the Amici the *First and Fourteenth Amendments of the U.S. Constitution*[1160] provided constitutional protections for these choices, because on several occasions the Supreme Court had acknowledged that a person is permitted to "define for himself or herself what constitutes a meaningful existence".[1161]

Thus, the Amici had summarized their constitutional arguments by asserting that:

> [T]he **Washington** and New York statues are irreconcilable with the motivating spirit of the First and Fourteenth Amendments. Those **terminally ill persons whose religions recognize that physician-assisted suicide** is an appropriate ethical and moral choice, or that the determination is best left to the individual's own conscience, are prevented from making this most personal decision in accordance with their

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[1160] *U.S. Const. amend I; U.S. Const. amend XIV*.

[1161] For instance, in the abortion case, *Planned Parenthood of Southeastern Pa. v. Casey*, the Supreme Court was of the opinion that "[t]he Due Process Clause has thus been held to protect 'personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education'."

See *Planned Parenthood, super* note 278 at 851 cited in Brief 36 Religious Organizations *et al.* for Respondents, supra note 927 at *10 [capitalization omitted].

> "own conception of [their] spiritual imperatives."[1162]

It is worthy to address that an extended exploration of the briefs that were presented to the Supreme Court *Glucksberg*[1163] and *Quill*[1164] physician-assisted suicide debates has revealed that an additional brief of paramount importance had claimed that legal bans to physician-assisted suicide were religious-based prohibitions that were founded on the Christian faith, and that such practice was unconstitutional.[1165]

The aforementioned claim was revealed in The *Philosopher's Brief*[1166], which was composed of six moral philosophers, who included Ronald Dworkin and John Rawls.[1167] The philosophers, who had advocated medical assistance to suicide had cautioned the Supreme Court in the "Introduction and Summary of Argument" of their brief that religious arguments that were employed to

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[1162] Brief 36 Religious Organizations *et al.* for Respondents, supra note 927 at *10 *15, *16 (capitalization, emphasis & word added).

[1163] *Glucksberg, supra* note 114.

[1164] *Quill, supra* note 114.

[1165] Washington v. Glucksberg, 117 S. Ct. 2258 (1997) & Vacco v. Quill, 117 S. Ct. 2293 (1997) (Appellant Brief) [WL 708956] [Philosophers' Brief].

[1166] Philosophers' Brief, supra note 1165.

[1167] *Ibid.*

support the prohibition to physician-assisted suicide held no place via the U.S. Constitution.[1168] The philosophers had sent a clear message to the U.S. Supreme Court that:

> These cases do not invite or require the Court to make moral, ethical or **religious judgments** about how people should approach or confront their death or about when it is ethically appropriate to hasten one's own death or to ask others for help in doing so. On the contrary, they ask the Court to recognize that individuals have a constitutionally protected interest in making those grave judgments for themselves, **free from the imposition of any religious or philosophical orthodoxy by court and legislature**. To the end, states may regulate and limit the assistance that doctors may give individuals who express a wish to die. But states may not deny people in the position of the patient-plaintiffs in these cases the opportunity to demonstrate, through whatever reasonable procedures the state might institute – even

[1168] *Ibid* at *3.

> procedures that err on the side of caution – that their decision to die is indeed informed, stable, and fully free. **Denying that opportunity to terminally ill patients who are in agonizing pain or otherwise doomed to an existence they regard as intolerable could only be justified on the basis of a religious or ethical conviction about the value or meaning of life itself. Our Constitution forbids government to impose such convictions on its citizens**".[1169]

Furthermore, in accordance to Ronald Dworkin's *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom*[1170] Dworkin was of the opinion that "**[t]he Roman Catholic Church" has been the strictest and the most successful adversary to practices of assistance to dying**.[1171]

[1169] *Ibid* [emphasis added]; See also Battin, supra note 517 at 124.

[1170] Dworkin, supra note 530.

[1171] *Ibid* cited in Brief 36 Religious Organizations *et al.* for Respondents, supra note 927 at 7 [capitalization omitted & emphasis added].

Fundamentally, the Amici had asserted that the government's perception of physician-assisted suicide endorsed one religious viewpoint, to the exclusion of all others.[1172] Such endorsement ran contrary to the "purpose" and reasons" behind the Establishment clause."[1173]

A similar argument was later employed in *Baxter v. Montana*[1174] where the same religious Amici Curiae had presented in their brief the argument that an absolute ban to "aid in dying" violated Montana's Constitutional rights protected by the Establishment Clause" because various pious and "spiritual" ideologies of the "terminally ill" pertaining to assisted death were being disregarded.[1175]

[1172] Brief 36 Religious Organizations *et al.* for Respondents, supra note 927 at 9-10.

[1173] *Ibid* at 5, 6, 10, 11, 12.

[1174] *Baxter, supra* note 295.

[1175] Brief of Religious Amici Baxter, super note 1034 at vii & x.

Summary of Chapter II of Part Two

Research under this segment has provided evidence that the *Glucksberg*[1176] Court had perhaps attempted to advance a religious purpose in preventing a federal constitutional right-to-suicide.

Justice Rehnquist in the *Glucksberg* Supreme Court case had not examined the early Christian stance on suicide where several studies had suggested that early Christians had held a tolerance for suicide.[1177] Instead the Justice had relied upon the Anglo–Common Law "history and tradition" of the prohibition to suicide, which historically was based on Augustine's Christian-inspired prohibition to suicide.[1178]

Contrarily, Justice Reinhardt in the *Compassion in Dying, en banc*[1179] case had presented an examination of the early Christians and their stance on suicide.[1180] His results had formulated an opinion, which insisted that historically

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[1176] *Glucksberg, supra* note 114.

[1177] *Ibid*; See especially *Compassion in Dying, en banc, supra* note 805.

[1178] *Glucksberg, supra* note 114.

[1179] *Compassion in Dying, en banc, supra* note 805.

[1180] *Ibid.*

Christians had commonly practice suicide.[1181] The Justice had supported his conclusion by first demonstrating that certain Biblical characters had undertaken suicide.[1182] Reinhardt had also provided claims that suicide and its assistance had been commonly exercised through the practice of Christian martyrdoms.[1183]

It should be observed that it is beneficial for opponents to the legalization of medical-assistance to dying to refrain from adopting Justice Reinhardt's interpretation of the historically account of Christianity that supported the practice of suicide, and its assistance.

[1181] *Ibid.*

[1182] *Ibid.*

[1183] *Ibid.*

Conclusion

This dissertation has evidenced that in the realm of medical end-of-life practices, physician-assisted suicide remains the one procedure where the patient actually causes the factual harm by self-administrating the prescribed medication, which results in death. Although, at times the procedure maybe contemporarily be described as medical-assistance to dying or dignified death, it remains that if the incurable patient intakes medication that was prescribed by the health professional; the procedure is classified as physician-assisted suicide.

The various jurisdictions that offer medical-assisted death are as follows: the Province of Quebec's practice qualifies as voluntary euthanasia; in Canada the medical procedures include both physician-assisted suicide and voluntary active euthanasia; whilst, in Europe, some jurisdictions practice both euthanasia and physician-assistance to suicide - these particular jurisdictions oft-provide liberal paradigms for end-of-life practices; whilst, in the United States, all forms of euthanasia and a federal-based physician-assistance to suicide remains illegal, nonetheless several states have legalized or decriminalized physician-assisted suicide. Thus, physician-assisted suicide is a legal medical procedure, which is slowly increasing amongst national and international jurisdictions, but American states and international nations that allow for the practice are still limited.

The controversy that had surrounded judicial debates involving the legalization of physician-assisted suicide had created constitutional challenges that had attracted the attention of numerous religious groups, organizations and faith-followers. In North America this has predominately consisted in numerous Christian Canadian Interveners and Christian American *Amici Curiae*. Due to the fact that for many faith-followers physician-assisted suicide had been perceived as suicide, thus a sinful act in accordance to traditional Christian beliefs, and that the medical procedure had equally qualified as murder, the latter being condoned by the Ten Commandments.

In Canada, the Evangelical Fellowship of Canada had acted as an Intervener in both the Supreme Court of Canada *Rodriguez* and *Carter* cases in the attempts to maintain physician-assisted suicide's bans through Christian religious influences. In the *Rodriguez* factum the Evangelical Fellowship of Canada had been accompanied by the Canadian Conference of Catholic Bishops. An analysis of this *Rodriguez* factum has demonstrated that the submissions of the EFC and the CCCB were overtly religious in nature. The agenda of the pious groups had consisted in ensuring that the *Canadian Charter* should have been interpreted in accordance to God and His Holy Scriptures, more specifically, that section 7 of the *Charter* should have been construed in light of the supremacy of God clause of the preamble of the *Charter*. The Interveners had also endeavored to convince the Supreme Court that the sanctity of life should have been understood through a Christian perspective, and that human life

should had been attributed as being God's property rights. Even though, the *Rodriguez* Supreme Court had not publicly addressed these aforementioned religious submissions, the Court reminded us that legally the sanctity of life was not dependent upon a religious interpretation. Additionally, it was argued by an awarding winning author that it was highly probable that the objective of s. 241*(b)* of the *Criminal Code* was based upon a Christian-inspired prohibition to physician-assisted suicide. Thus, further making the absolute ban to physician-assisted suicide unconstitutional.

In contrast with the *Carter* factum the EFC had submitted arguments that first appeared to have evolved from being Christian-inspired submissions to non-religious arguments, but with the same objective to prohibit the legalization of physician-assistance to suicide. The aim of EFC's second factum had seemed to cast aside religious repertoire and to comply with a secular discourse. In spite of this appearance, an in-depth examination of the factum has revealed that the EFC's attempt to introduce a non-dogmatic sanctity of life was not presented before discreetly referencing that human life was a "*scared trust*" that was "God-given". The EFC had also aimed to include religious morality in the notion of secularism, and had equally referenced a leading end-of-life expert, who was against the legalization physician-assisted suicide; religious-inclined academic, Etienne Montero. The *Carter* Supreme Court did not acknowledge the religious arguments that were submitted by the EFC, but it remains paradoxical that the Attorney Generals had relied upon the expert

opinion of Etienne Montero to discredit the legalization of physician-assisted suicide.

Whilst, an analysis of American physician-assisted suicide case law has disclosed that American Christian *Amici Curiae* had aspired to ensure the accuracy of the history of Christianity's stance towards suicide, and its assistance, in court debates. These religious group, organizations and faith-followers had provided the *Glucksberg* and *Quill* Supreme Court with briefs that either had negated or had supported the legalization of physician-assisted suicide. An examination of the relevant factums has shown that the submissions by various Christian *Amici Curiae* were primarily in reaction to the *Compassion in Dying v. Washington, en banc* ruling. Justice Stephen Reinhardt had utilized Christianity's history of the tolerance of suicide and its assistance to support his opinion that there was a constitutional protection in "one choosing the time and manner of his death". This reaction to the *Compassion* ruling had caused a plenary of Christian organizations and faith-followers to submit historical-inspired faith arguments that had either contradicted or had supported the Justice's historical account of Christianity that endured suicide and its assisted suicide. Domains that were covered by the Justice Reinhardt and the *Amici Curiae* had included: deaths of Biblical characters and Christian martyrdoms.

It remained that in determining the history of suicide and its assistance, Justice Rehnquist in the *Glucksberg* Supreme Court had omitted important time periods that included the antiquity of Christianity. Paradoxically, Rehnquist had debuted his deep-root test in an era that was renowned to have insisted on a Christian-ban to self-murder. Like Canadian discourses that had suggested that prohibitions to physician-assisted suicide was based on an historically Christian-ban to the practice, several American *Amici Curiae* had also presented the same argument.

Thus, it was fundamentally noted by Canadian and American proponents to the legalization of physician-assisted suicide that the judicial time-frames that were utilized by Justice Sopinka in the *Rodriguez* case, and by Justice Rehnquist in the *Glucksberg*[1184] decision to evidence the existence of absolute bans to physician-assistance suicide were unconstitutional because they served a religious objective or purpose; a Christian prohibition to physician-assisted suicide. Such was found to be contrary to the *Canadian Charter* and to the *U.S. Constitution*.[1185]

[1184] *Glucksberg, supra* note 114.

[1185] A brief recall of the basics tenants of Canadian and American constitutional laws have demonstrated that the creation of North American laws prides itself in rendering laws that are free from the advancement of religious dogmas and purposes.

In Canada, notable constitutional expert Peter Hogg has acknowledged that it was highly probable that the implementation of "freedom of conscience and religion" as found in section 2(a) of the *Canadian Charter of Rights and Freedom* was "to resist the application of laws to practices allegedly demanded by a particular religion, although the practices are generally proscribed by law".

In conclusion, through a law and religion approach, this essay has evidenced that in Canadian and American physician-assistance to suicide judicial debates that Christian Interveners and *Amici Curiae* had presented two roles. The Canadian Christian Interveners' role had consisted in maintaining physician-assisted suicide's ban through Christian religious influences. Whilst, the American Christian *Amici Curiae's* role was to ensure the accuracy of the history of Christianity's stance of suicide, and its assistance.

And in the United States, the doctrine of separation of church and government powers has been explicitly embedded in the *U.S. Constitution*. Research has evidenced that on January 1, 1802,

former American President and Founding Father Thomas Jefferson had addressed the ideology and principle that existed amongst the "separation between Church & State" and the Establishment Clause and Free Exercise Clause of the First Amendment to the United States Constitution. In a letter that he had sent to "a committee of the Danbury Baptists association in the state of Connecticut", Thomas Jefferson had written the following:

> Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church & State […].

Jefferson's statement on the separation of church and state and the First Amendment's Establishment Clause have been employed in numerous American case law, such as in, *Everson v Board of Education*, 330 US 1 (1947).

See Hogg, supra note 482 at 15; *Charter, supra note* 148 ss 2(a), 7, 15; *U.S. Const. amend I, XIV;* Thomas Jefferson, "Jefferson's Letter to the Danbury Baptists: The Final Letter, as Sent", online: (1998) 57:6 The Library of Congress Information Bulletin < http://www.loc.gov > . [ellipsis added].

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